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Reports

OF

CASES DECIDED BY

The High Court of Judicature, North-Western Provinces,

AND BY

His Majesty's Privy Council on appeal from India.

---

**Editors :**

SATISH CHANDRA BANERJI, M.A., LL.D.

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**1908.**

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# Allahabad Law Journal.

## REPORTS.

### PRIVY COUNCIL.

BAJRANGI SINGH AND OTHERS

*versus*

MANOKARNIKA BAKSH SINGH.

*Hindu Law—Mitakshara—widow's estate—alienation—consent of reversioners—Custom—Bhale Sultan Chhatris of Oudh—Exclusion of daughters from inheritance*

Among the *Bhale Sultan Chhatris* of Oudh, there is a custom by which the daughters are excluded from inheriting their father's property.

A Hindu widow, governed by the law of Mitakshara, can alienate her husband's property without legal necessity on obtaining the consent of the whole body of persons constituting the next reversion and it is not necessary for her to obtain the consent of all his kindred who can reasonably be regarded as having an interest in questioning the transaction. *Ramphal Rai v. Tula Kuari* I. L. R., 6 All. 116 not approved. *Radha Shyam v. Joy Ram* I. L. R., 17 Cal., 896 approved. *Nobo Kishore v. Hari Nath* I. L. R., 10 Cal., 1102, *Murudu Mathu v. Srinivasa* I. L. R., 21 Mad., 128, *Vinayak v. Govind* I. L. R., 25 Bom., 129 referred to.

APPEAL against a judgment of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Rai Bareli.

Suit for possession.

The courts below dismissed the suit.

Plaintiff appealed.

The material facts appear from the judgment.

*Ross* for the appellant.

*L. DeGruyther* for the respondent.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE.—Sitla Bakhsh Singh, a Hindu of the tribe of Bhale Sultan Chhatris, resident in Sul-tanpur, died some time before the annexation of Oudh

PRIVY COUNCIL.

1907.

October 31.

LORD  
MACNAGHTEN,  
SIR ANDREW  
SCOBLE,  
SIR ARTHUR  
WILSON.

*Sir A. Scoble.*



CIVIL.

1907.

BAJRANGI

v.

MANOKARNIKA.

*Sir A. Scoble.*

leaving him surviving a widow named Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. He was absolute owner of an estate known as Pindara Karnai and other property, which at his death passed to his widow, and at her death would have passed to his daughters, but for a custom of the tribe excluding daughters and their issue from succession. The widow died on the 6th of August 1892, having previously sold the whole of the estate to her son-in-law, Maheshar Bakhsh Singh, the husband of her daughter Jagrani Kunwar, and mutation of names in the revenue registers was effected in his favour. After the death of Maheshar, which occurred on the 3rd of April 1893, the name of his son, Manokarnika Bakhsh Singh, the present respondent, was entered in the government records as proprietor of the estate; and the present appellants (with one Mahpal Singh, who died while the case was pending) brought the suit now under appeal, claiming that, by reason of the custom of the Bhale Sultan Chhatris, they were the next heirs in reversion to the estate of Sitla Bakhsh.

In the courts below, and before their Lordships two main questions were raised. First, whether the custom had been proved; and, secondly, whether certain deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death. In the courts in India, the District Judge held the custom not proved and the deeds not binding; the Judicial Commissioner came to the exactly opposite conclusion on both points. The conflict of opinion in the courts in India upon the questions of custom has made it necessary for their Lordships to examine carefully the evidence in this case, in order to ascertain whether the alleged custom has been satisfactorily proved. In making this examination, their Lordships have been materially assisted by the elaborate analysis of the evidence made by both the learned judges below, and by the learned Counsel who argued the appeal. They will briefly state the grounds on which they consider the judgment of the Judicial Commissioner on this point must prevail.

The Bhale Sultan clan appear to have derived their name, some three centuries ago, from their warlike exploits in the service of the Emperors of Delhi. They are now settled in considerable numbers in the district of Sultanpur in Oudh, in several villages in which they constitute the bulk of the population. In the language of the Indian Evidence Act 1872 (section 48) they form a "considerable class of persons." The evidence in support of the custom was mainly oral, and no document was produced of an earlier date than the British annexation. Thirty-five witnesses were examined on behalf of the appellants. They were all members of the Bhale Sultan clan, mostly men of mature age and of good position. They all gave evidence that in their clan it was the custom that daughters and their issue were excluded from succession to the separated estate of their father, and put forward thirty-nine instances in which this exclusion had taken place. The Judicial Commissioner held that twenty of these instances had been satisfactorily proved. For the respondent no evidence was given in contradiction of these instances, though ample time was allowed for the production of such testimony had it been available; but six witnesses were called, one of whom had signed a *wajib-ul-arz* in which the custom was set up, and two gave evidence in support of the custom.

In corroboration of the oral evidence, a number of village administration papers (*wajib-ul-arz*) were produced, of which seven were admitted by both courts to be relevant, as relating to Bhale Sultan villages. In all these the rule is stated that a daughter and her issue do not *alal-umum* (that is, as a general rule) obtain the share. One of them is attested by 44 zemindars and lambardars of the village, another by 49, others by 8 or 10. The dates of these documents are not given, but they were all officially recorded prior to the institution of this suit, and quite independently of the parties thereto.

One other piece of evidence remains to be noticed. It has been stated that Sitla Bakhsh left two daughters, Janga Kunwar and Jagrani Kunwar. In 1876, Janga Kunwar filed a suit against her mother Daryao Kunwar and her brother-in-law Maheshar Bakhsh for a declaratory decree that she was entitled to succeed to half her father's estate; and in answer

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to her claim, the Vakil for the defendants put forward the plea that "among Bhale Sultans a daughter never succeeded to the inheritance of her father." The Court came to no decision on the point, but disposed of the suit on another ground, reserving Janga Kunwar's right to put forward her claim on the death of her mother. The fact, however, that this defence was raised shows that the existence of the custom was present to the mind of Daryao Kunwar at the date of the transactions to which their Lordships will now proceed to refer.

Although Daryao Kunwar appears to have been willing to invoke the custom as a defence against the claim of her unmarried daughter, she was at the same time endeavouring to defeat the operation of the custom in regard to her married daughter, Jagrani Kunwar, and her husband, Maheshar Bakhsh Singh, the father of the present respondent. During the period from 21st October 1872 to 24th July 1875, she executed five deeds of sale, by which she purported to transfer, for valuable consideration, successive portions of her husband's property to Maheshar Singh. The District Judge has found that these deeds were executed without "legal necessity"; and it is certain that the preliminary consent of her husband's reversionary heirs was not obtained. One of these heirs, Matadin Singh, the father of the appellants, Jagdamba Singh and Bajrangi Singh, brought a suit in the court of the Deputy Commissioner of Sultanpur in 1873 to set aside three of the deeds; but on appeal this suit was dismissed on a technical ground by the Judicial Commissioner on the 6th May 1874. Janga Kunwar's suit, already referred to, was dismissed on the 25th August 1876. Having thus succeeded, for the time being, in the courts, Daryao Kunwar entered into negotiations with the persons who were at that time admittedly the nearest reversionary heirs to her husband's estate, and obtained from them two documents, called deeds of relinquishment, one dated the 4th May 1877 and the other dated the 29th January 1878. The first of these was signed by five persons, four of whom died without issue in Daryao Kunwar's life-time, and the fifth, Baijnath Singh, is the father of the plaintiff Mehpal Singh, who died while this suit was pending in the court of the District Judge, and who is now represented by the appellants. The second was signed by Janga Kunwar, Matadin Singh (the father of

the present appellants), and Hanuman Singh, who is still living, but is not a party to this suit. In these documents, which are identical in terms, after enumerating the sales by Daryao Kunwar to Maheshar Singh, the executants go on to say :—

“We all have given our full consent to all those sale-deeds which the Thakurain has executed in favour of the Babu, and will ever remain so satisfied. And after the death of the Thakurain we shall bring no claim against the Babu on account of the moveable and immoveable property owned by her; hence we have executed this deed of agreement so that it may serve as an authority, and be of use in time of need.”

“It was not disputed,” says the Judicial Commissioner in his judgment, “that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds.” Upon these facts, the Judicial Commissioner found that the transfers to Maheshar Singh were valid, and dismissed the appeal.

The restrictions imposed by the Hindu Law upon the widow's power to alienate her deceased husband's estate have frequently been the subject of consideration by this Committee.

“For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred.” *Collector of Masulipatam v. Cavalry Venkata Narrainappa* (1).

“The kindred in such case,” their Lordships observe in a later case, “must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law.” *Raj Lukhee Dabee v. Gokool Chunder Chowdhri* (2).

Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of *Ramphal Rai v. Tula Kuari* (3) considered that :—

“The plain principle deducible from these rulings of the Privy Council

(1) (1861) 8 Moo. I. A. 529 at p. 551. (2) (1869) 13 Moo. I. A. 209 at p. 228.

(3) (1888) I. L. R. 6 All. 116.

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is that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu Law, it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction."

And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive had no greater effect in her favour than it would have had if he had been a stranger. "We think," say the learned Judges,

"that the spirit of the Hindu Law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt; and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioner. In other words, her right and theirs have one common basis, that of survivorship to the widow, and it is incapable of anticipation."

The High Court of Calcutta has taken a different view, based upon a long current of authority in that Court, albeit two of the learned judges—Garth, C. J., and Pigot, J.—considered that the principles on which the decision was founded were open to great objection. In the case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (4), a Full Bench held that under the Hindu Law current in Bengal—

"A transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property."

The ground of the decision is thus shortly stated by Garth, C. J. :—

"If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make.

And more fully by Mitra J. :—

"Whatever conflict there may be upon the question whether a Hindu may sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, there is no conflict in the decisions, since the case of *Jadamoney* was decided in the late Supreme Court of Calcutta, upon the question whether the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid or not

(4) (1884) I. L. R. 10 Cal. 1102.

Such relinquishment by the widow has been held for a long series of years to be valid. . . . But if the widow is competent to relinquish her estate to the next male heir of her husband, it follows as a logical consequence, that she can alienate it merely with his consent without any legal necessity."

In a subsequent case *Radha Shyam v. Joy Ram Senapati* (5) the same High Court held that the consent must be of the whole body of persons constituting the next reversion.

The Calcutta decision, of course, is not binding upon other High Courts, but it has been followed in Madras. In the case of *Marudamuthu Nadan v. Srinivasa Pillai* (6), decided by a Full Bench of the Madras High Court in 1898, Subramania Ayyar, J., says :—

"I think it unnecessary to go into the question whether the Hindu Law, according to the texts or the commentaries, lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Court. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule, as stated by the Judicial Committee in *Behari Lal v. Madho Lal* (7), should, I think, be taken to be a rule applicable to the Presidency too, subject no doubt, to the restriction pointed out by their Lordships, viz., that the surrender should be absolute and complete, and that the whole limited estate should be withdrawn, a restriction that would guard against the injurious results which would follow if the rule were not so qualified."

The question was also considered by the High Court of Bombay in 1901 in the case of *Vinayak v. Govind* (8). In the course of his judgment, Jenkins, C. J., says (at p. 173):—

"There can be no question that, apart from legal necessity, a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy. The High Court of Calcutta on the whole appears

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(5) (1850) I. L. R. 17 Cal. 896.

(6) (1898) I. L. R. 21 Mad. 128

(7) (1891) L. R. 19 I. A. 30.

(8) (1900) I. L. R. 25 Bom. 129.

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to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating by the surrender of her own interest, the interest of the reversioners. It is impossible not to feel some difficulty as to this doctrine. . . . The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption under certain circumstances, and it finds no support in the texts. . . . This view has too, in a measure, the sanction of the Privy Council."

And he quotes the cases in *Collector of Masuliputam v. Cavalry Vencata Narrainapah* <sup>(1)</sup> and *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* <sup>(2)</sup>, which have been already referred to. "Turning then to Bombay," he goes on to say, "the High Court here appears to have accepted this view rather than that which finds favour in Calcutta. In the same case Ranade, J., observes (at p. 139):—

"The Bengal theory that the widow's interest was a life interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title has never met with much acceptance on this side of India. One leading case—*Varjivan Rangji v. Ghelji Gokaldas* (9)—lays down that the consent must be of all the kindred, but that does not mean that every single member who is a kindred must actually join in the conveyance."

And the conclusion to which he comes is that, in order to validate an alienation by a widow otherwise than from legal necessity,

"The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one."

The principle being thus admitted by the High Courts in India, the question of the *quantum* of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lord-

(1) 8 Moo. I. A. 529 at p. 551 (1861). (2) (1869) 13 Moo. I. A. 209 at p. 228.

(9) (1881) I. L. R 5 Bom 553.



ships have not been referred to any cases in the Province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High Court of Calcutta *Radha Shyam v. Joy Ram* <sup>(5)</sup> that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

Applying this rule to the case now under consideration, the Judicial Commissioner has found that "of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh, and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers superior in degree to Hanuman Singh and Sheo Dayal Singh, or equal in degree to Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai." Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. *Ominis rati habitio retrotrahitur et mandato priori æquiparatur*. The appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the decree of the Judicial Commissioner, dated the 6th March 1900, confirmed. The appellants must pay the costs of the appeal.

Solicitors: *Messrs. Barrow, Rogers and Neville* for the appellants.

Solicitors: *Messrs. Watkins and Lemprier* for the respondents.

*Appeal dismissed.*

(5) (1890) L. L. R. 17 Cal. 896.

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versus

## GHANSHYAM MISRA AND ANOTHER.

*Court Fees Act (VII of 1870), Sched. 2, Art 17 Clause 1.—Code of Civil Procedure (Act XIV of 1882), section 283—Valuation of the suit.*

Where a party prefers a claim to any property in execution of a decree but fails to establish it and brings a suit to establish the right, the suit is of the nature described in section 283, of the Code of Civil Procedure. The plaint is governed by the first head of Article 17 of schedule II, of the Court Fees Act, and is chargeable with only a ten-rupee stamp.

The value of the action must mean the value put by the plaintiff, and the sum in the execution of the decree is not the criterion. There is in the statute no general or over riding reference to value. The terms of sub-section 1 of article 17 contains no reference to value. In short, the statute, for good reasons or bad, has dealt with certain actions irrespective of value; and the present action is one of them.

*Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni*, 1. L. R., 9 Bom., 20 approved.

APPEAL against the judgment of the High Court of Judicature at Fort William in Bengal.

The material facts appear from the judgment.

The judgment of their Lordships was delivered by

*Lord Robertson.*

LORD ROBERTSON.—The sole question in this appeal is what is the proper court-fee payable on the plaint in the suit. The Act governing the question is the Court Fees Act (VII of 1870). Proceeding on the theory that what was due was Rs. 20, the appellant stamped her plaint accordingly; her suit was dismissed in the court of first instance on the ground that her plaint was insufficiently stamped; and this judgment was affirmed by the High Court of Bengal in the judgment now appealed against. The present appeal has been heard *ex parte*.

For the right determination of the question at issue it is necessary to ascertain what are the objects and the nature of the suit. Now, fortunately, this is not dubious. The plaintiff succinctly and accurately states that the cause of action accrued on 24th April 1899, that being the date of a judgment

pronounced against her in the court of the Subordinate Judge of Purneah in certain execution proceedings. What had taken her into that court was this : she had bought a property from the second respondent and had taken possession and was registered as proprietor. After and notwithstanding this, the first respondent, purporting to be a creditor of the second respondent under a decree for Rs. 62,022 attached the property and advertised it for sale. The appellant lodged with the Subordinate Judge of Purneah, before whom the execution proceedings took place, a claim to the property claiming that her right should be declared and that an injunction should issue against the execution of the decree held by the first respondent. This claim was rejected by the Subordinate Judge on 24th April 1899, and his decree is the cause of action in the suit which gives rise to this appeal.

Now the right of the appellant to sue for the establishment of her right, which the Subordinate Judge had negatived, rests on the 283rd section of the Civil Procedure Code (XIV of 1882).

"The party against whom an order under section 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute ; but, subject to the result of such suit, if any, the order shall be conclusive."

This is clear of itself, and the High Court, in the judgment appealed against, describes the suit as "of the nature referred to in section 283."

Having thus ascertained what is the nature of the suit, their Lordships turn to the Court Fees Act to see whether such actions of appeal are specifically dealt with ; for it is only if they are not specifically dealt with that the task arises of finding to which group of cases this is to be assigned. Now, the 17th article of schedule II. is expressly made to apply to "Plaint or memorandum of appeal in each of the following suits" :

"1. To alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent, or of any Revenue Court."

Now this is an exact description of the effect of the appellant's suit. It is true that, instead of asking the court to alter

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or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and section 283 of the Civil Procedure Code, under which section the action is brought, recognizes such a suit as not merely an appropriate, but the only mode of obtaining review in such cases.

Their Lordships are accordingly of opinion that the first head of article 17 of schedule II. applies to the case. This view is opposed not only to that of the respondents and of the High Court, but to that of the appellant. Misled by the form of the action directed by section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action. Accordingly, on the one hand, the appellant, pointing to her prayer for a declaration, says she pays Rs. 10 on that, and, pointing to her prayer for injunction, says she pays other Rs. 10 on that. In their Lordship's judgment, this is not the proper view of the suit taken as a whole; but, if it were, it would be extremely difficult for the appellant to bring her suit, which asks consequential relief as well as a declaratory decree, within the enactment which she invokes.

On the other hand, the respondents equally ignore the essential fact that this is a plaint for review of a summary decision; and they go on to bring the action, treated as an original action, within the class of cases where the court fees are *ad valorem* of the action. It is not necessary to discuss this in detail; but their Lordships are not satisfied that, even if the value of the action determined the fee, the respondents have rightly ascertained the value. What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit.

Their Lordships, however, are satisfied that there is in the statute no general or overriding reference to value. The terms of sub-section 1 of article 17 (which they hold to apply) contains no reference to value. In like manner the class of suits dealing with arbitration awards is coupled with suits such as that immediately in question; awards may be of value Rs. 10 or of value Rs. 100,000; and yet no distinction is made. In short, the statute, for good reasons or bad, has dealt with certain actions irrespective of value; and the present action is one of them.

This being a matter of practice, although to be determined by statute, their Lordships would willingly have given much weight to any consentaneous practice. But while the respondents can claim to be supported by decisions of the Calcutta and Allahabad High Courts, there is a contrary decision in the Bombay High Court—*D hondo Sakharam Kulkarni v. Govind Babaji Kulkarni*.<sup>(1)</sup> which has the high authority of Sir Charles Sargent, whose judgment is in accordance with the conclusion at which their Lordships have arrived.

It is a singular fact that while the *ratio* of the appellant's case is at variance with that which their Lordships adopt, there is only a difference of Rs. 10 in the practical result,—the appellant having maintained that she was liable for Rs. 20, while she was truly liable for only Rs. 10. On the other hand, the sum held due in India was Rs. 1,320, and this was the result of the *ad valorem* theory. It is to be observed that the appellant did not, as she should have done, stand on the first clause of the 17th article of schedule II., but, on the contrary, contributed to mislead the courts, by advancing a theory which was as unsound as that of the respondents. Their Lordships think that, in these circumstances the justice of the case is met by the first respondent (who alone appeared in the suit) paying half of the appellant's costs in the High Court and in England.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the decrees of the High Court and the court of the Subordinate Judge ought to be discharged, that the case ought to be remitted to the

(1) [1884] L. L. R., 9 Bom., 20.

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High Court with a view to the necessary steps being taken to dispose of the remaining issues reserved by the Subordinate Judge for future consideration, that the first respondent ought to pay half the appellant's costs in the High Court, and that the costs in the court of the Subordinate Judge ought to be dealt with by the Subordinate Judge after the other issues have been disposed of.

The first respondent will pay half the appellant's costs of this appeal.

Solicitor for the appellant, Mr. C. G. Farr.

Respondents were not represented.

*Cause remanded.*

## HIGH COURT.

MEGHAN DUBE AND ANOTHER.

*versus*

PRAN SINGH AND OTHERS.\*

CIVIL.

1907.

December 4.

BANERJI, J.  
RICHARDS, J.

*Code of Civil Procedure (Act XIV of 1882), Section 562, 566—Contract made on behalf of a minor—Joint Hindu Family—Remand.*

The ruling in *Mohori Bibi v. Dharmo Das Ghose*, I. L. R. 30 Cal., 539 (P. C.) only declares that a contract made by a minor is void and not voidable, and does not apply to the case in which a contract is entered into by persons of full age on behalf of a minor belonging to a joint family.

Where no new issues have to be framed, but only such of the issues as the first court left entirely undecided are to be determined, the court of appeal is justified in sending the case back under section 562, of the Code of Civil Procedure. *Mata Din v. Jamna Das*, I. L. R. 27 All., 691, referred to.

FIRST APPEAL from an order of Pandit Sri Lal, District Judge of Ghazipur reversing a decree of Babu Aghor Nath Mukerji Officiating Munsif.

Suit for possession and damages.

The plaintiffs, father and son, came into court upon the allegation that the defendants 4 to 5 executed a usufructuary mortgage in the name of plaintiff No. 2, who was

\* F. A. F. O. No. 19 of 1907.

a minor, of a part of their joint *sir* and cultivatory holding and that the defendants 1 to 3, who were subsequent mortgagees of the land in suit colluding with the defendants, had dispossessed them and collected rent of the land. Hence the suit for recovery of mortgage money and in the alternative for possession and damages.

The defendants appellants denied the plaintiffs allegations, the execution of the mortgage deeds and the passing of the consideration. They further alleged that the mortgagee never obtained possession within twelve years next preceeding the suit and contended that the suit was barred by limitation.

The Munsif framed 8 issues and finding upon issues Nos. 1, 2 and 3 that the suit was not bad for non-joinder of parties, that the mortgage was not proved to have been executed for consideration, and that the suit was barred by limitation, dismissed the suit. He also pointed out that according to the Privy Council ruling in

*Mohori Bibi v. Dharnoodas*, [1903] I. L. R. 30 Cal., 539, the mortgage being in favour of a minor could not be enforced. The lower appellate court, finding that the mortgage was duly executed and for consideration and that the suit was not barred by limitation, remanded the case under section 562 of the Code of Civil Procedure.

Defendants appealed.

*Harbans Sahai*, for the appellants contended that the mortgage being a void contract, no suit could lie upon it. He referred to the Privy Council ruling in I. L. R., 30 Cal., page 539, and submitted that their Lordship clearly held that all the parties to a contract must be competent to contract and if either of them was a minor, the contract was void and not voidable and none of the parties could enforce it.

Further he contended that the suit not having been decided on a preliminary point by the first court, the order of remand was bad in law.

Last of all he urged that the suit was barred by limitation.

*Muhammad Ishaq*, for the respondents, submitted that the plea of minority was not raised by the defendants in the written statement and the pleaders of the parties admitted

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in the lower appellate court that the ruling of their Lordships of the Privy Council had no application to the present case. It was not open to the appellants to raise it now.

He further submitted that the mortgage was made to a joint Hindu family in the name of one of its members. The ruling therefore did not apply and in any case the ruling could not be held to mean that a mortgage in favour of a minor, was void.

The judgment of the court was delivered by

*Banerji J.*

BANERJI J.—The suit which has given rise to this appeal was brought by two plaintiffs who alleged that the defendants Nos. 4 and 5 executed in their favour a usufructuary mortgage on the 4th of June 1893, and put them in possession of the mortgaged property, that the mortgagors subsequently executed another mortgage of the same property in favour of the defendants Nos. 1 to 3 on the 17th of July 1898, and that the subsequent mortgagees dispossessed the plaintiffs. The plaintiffs stated that they were father and son and formed a joint family, and that the mortgage was obtained in the name of one of them, who, it is admitted, was on the date of the mortgage a minor. The plaintiffs claimed possession of a portion of the mortgaged property from which they alleged they had been dispossessed, and they also claimed damages. In the alternative they asked for a decree for the mortgage money. The suit was defended by the first three defendants, the subsequent mortgagees, who denied that the mortgage set up by the plaintiff had been executed in their favour. They further denied that the plaintiffs were ever in possession and pleaded limitation. They also put forward other pleas to which it is unnecessary to refer for the purposes of this appeal. The court of first instance dismissed the claim holding that the mortgage had not been proved, that even if the mortgage-deed was executed, it was without consideration, and that the claim was time-barred. On appeal the lower appellate court framed 2 issues: 1.—whether the mortgage-deed in question was executed without consideration, and 2.—whether the plaintiffs' suit was barred by limitation. On both these points the court found in favour of the plaintiffs. The court of first instance had dismissed the suit on the further ground that the contract of mortgage,

which was in favour of a minor, was void. On this point the lower appellate court differed from the court of first instance and held that the ruling, of the Privy Council in the case of *Mohori Bibi v. Dharmodas Ghose* <sup>(1)</sup>, on which the first court had relied was not applicable. The appellate court accordingly remanded the case to the court of first instance under section 562 of the Code of Civil Procedure for trial of the other issues which arose in the case but which had not been determined by the first court in view of its findings on the issue to which we have referred. From this order of remand the present appeal has been preferred. The first plea raised on behalf of the appellants is that the contract on which the suit is based is void, inasmuch as the mortgagee was a minor at the date of the execution of the mortgage-deed. The learned Vakil for the appellants relies upon the ruling of the Privy Council referred to above upon which the court of first instance had based one of its conclusions. That was a case in which their Lordships of the Privy Council held that a contract made by a minor was absolutely void, and not merely voidable. That, however, is not the case here. The contract in this case was made by persons of full age but the person in whose favour the mortgage-deed was executed was a minor. The question of the validity of the mortgage does not in our opinion arise. It was alleged in the plaint that both the plaintiffs were members of a joint family, that the mortgage was made in favour of that family, and that the mortgage-deed was executed in the name of one of the members only. There was no specific denial of these allegations by the defendants and the case proceeded on the basis of their correctness. This was therefore a case of a mortgage in favour of a joint family and not of a minor. We may also observe that the defendants did not raise the plea, in their written statement that the contract was void. That being so, we think there is no force in the first plea taken in the memorandum of appeal.

It is next urged that the court below ought not to have remanded the case under section 562 of the Code of Civil Procedure, because the court of first instance had not decided the suit upon a preliminary point. We think the ruling in

(1) [1903] I. L. R., 30 Cal., 539.

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*Matadin* versus *Jamna Das*, (2) on which the court below relies is applicable to the case and justifies the action of that court specially as no new issues have to be framed, but only such of the issues as the first court left entirely undecided are now to be determined. We dismiss the appeal with costs.

H. S.

*Appeal dismissed.*

(2) [1905] I. L. R., 27 All., 691.

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November 20.

STANLEY, C.J.

BURKITT, J.

INDAR SEN SINGH

versus

RIKHI SINGH AND OTHERS.\*

*Court-Fees Act (VII of 1870), section 7 Clause 1—Mortgage—sale—prior mortgages—no relief—redemption—fee payable on the plaint.*

Plaintiffs brought a suit for sale upon a mortgage. It was discovered that there were two prior mortgages on the property in respect to which no relief was claimed and no court-fee paid. The court below, however, decreed the suit and held the plaintiff entitled to redeem the prior mortgages without directing the sale to satisfy those debts. *Held* that the court-fee, paid on the plaint, was sufficient having regard to the relief claimed.

FIRST APPEAL against the decree of Moulvi Zain-ul Abdin, Subordinate Judge of Jaunpur.

Suit for sale.

The question in the case itself was one of fact—whether a certain mortgage was genuine or only a paper transaction, and whether it was the intention of parties to keep alive an earlier mortgage.

The court below decreed the suit.

The defendant appealed.

Their Lordships decided both the points against the appellant and dismissed the appeal.

A further question about the payment by the plaintiffs of court-fee on the plaint, was raised by the stamp reporter. The facts for the purposes of the report appear from the judgment.

*Ghulam Mujtaba*, for the appellant.

*Sundar Lal*, for the respondents.

*Stanley, C. J.*

The judgment of the Court was delivered by Stanley, C.J. (who, after dealing with the facts, observed):

\* F. A. 186 of 1905.

There is a matter to which our attention has been directed. The suit is a suit to enforce payment of a mortgage of the 10th of November 1897 by sale of the mortgaged property, and for no other relief. In the course of the proceedings, however, it was discovered that there were two prior mortgages affecting the whole or portion of the mortgaged property, namely, a mortgage of the 1st of March 1888, and another of the 23rd of February 1891. No relief was asked in respect of these mortgages, but in the decree of the court below it was provided that the plaintiffs, on payment of the prior mortgages, should be competent to get the property sold by auction, a relief which was not sought. No provision is made in the decree for the sale of the property to satisfy these debts, if paid. The stamp officer of the Court has reported that the court-fee, paid by the plaintiff in the court below, in view of the relief given to him, was insufficient, and that the court-fee paid on the appeal was likewise insufficient. The deficiency in the court-fee on the appeal has already been made good but the deficiency, if any, on the plaint has not been paid. It appears to us that in view of the relief claimed by the plaintiff in his plaint, the court-fees, which have been paid both here and below, are sufficient. Mr. *Sundar Lal*, on behalf of the plaintiffs respondents, expressed his willingness to pay the additional court-fee provided the Court gave his clients the supplemental relief to which the clients would be entitled, if the plaint were amended and proper reliefs arising out of the existence of these prior mortgages be granted, but he objects to the payment of any additional court-fee unless he gets those additional reliefs. We think his contention is right and that the decree of the court below went too far in providing for the redemption of the earlier mortgages, a relief, which as we have said before, was not sought. We think that the best course is to modify the decree of the court below by striking out the portion which deals with the prior mortgages. The directions contained in the decree from the words "If the plaintiffs pay" down to the words "Muhammad Mohsin" should be struck out of the decree. The decree will then be the usual mortgage decree for the sale of the mortgagee's rights in the mortgaged property, without prejudice to the claims of any prior incumbrancers. We direct a decree to be so framed, and we extend the time for payment of the mortgage debt up

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to the 20th of May 1908. On an application in the proper quarter the appellants may be able to obtain a return of the additional court-fees which they have been required to pay.

*Decree modified.*

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December 6.

STANLEY, C. J.  
BURKITT, J.

SHEO NARAIN

versus

NUR MUHAMMAD AND ANOTHER.\*

*Code of Civil Procedure (Act XIV of 1882), sections 244 and 318—right to sue for possession—Auction purchaser.*

An auction purchaser of the property in execution of his decree or his legal representative can not maintain a suit for possession, section 244 of the Code of Civil Procedure being a bar to the suit. *Madhsudan Das v. Gobind Pria*, I.L.R., 27 Cal., 34, *Kattayat Pathumayi v. Raman Menon*, I. L. R., 26 Mad., 740, *Kalian Singh v. Thakur Das*, 3 A. L. J. R., 234, S. C., 26 A. W. N., 87 followed.

*Sheo Narain v. Nur Muhammad*, 4 A. L. J. R., 434, S. C. I. L. R., 29 All., 463 reversed.

APPEAL under section 15 of the Letters Patent from the decision of Aikman J, confirming the decree of the District Judge of Jhansi.

The facts of the case are fully given at page 463 of I. L. R., 29 All., and at page 434 of 4 A. L. J. R.

*G. W. Dillon*, (with him *M. M. Malaviya*) for the appellant.

There are two points in the case; the first is that section 244 of the Code of Civil Procedure bars the suit of the auction purchaser for delivery of possession.

*Kattayat Pathumayi v. Raman Menon*, [1903] I. L. R., 26 Mad., 740.

*Madhsudan Das v. Gobind Pria*, [1900] I. L. R., 27 Cal., 34.

*Kalyan Singh v. Thakur Das*, (1906) 26 A. W. N., 87.

The second point is that the plaintiffs are not entitled to recover unencumbered 4 anna share. No doubt there is nothing to show that the share, advertised for sale, was subject to an incumbrance, but the memorandum of bids shows that the property was sold subject to an incumbrance.

*Sunder Lal*, for the respondents.

\*L. P. A. No. 36 of 1907.

As to the second point, I submit that Param owned a 10 anna share; a 4 anna share was mortgaged to Sheo Narain, and a two anna share to a third party. The remaining 4 anna share was free from an incumbrance. In the application for sale, the share sought to be sold is described as unencumbered; the sale certificate makes no mention of any incumbrance; further the finding is that the share was sold free from incumbrances.

[Stanley, C. J. What do you say about section 244 of the Code of Civil Procedure?]

I submit that section 244 of the Code does not apply for two reasons; 1st there is no dispute between the decree-holder on the one hand and the judgment-debtor on the other, but it is a dispute between the judgment-debtor on the one hand and the auction purchaser on the other. Secondly there is no dispute relating to the execution, discharge or satisfaction of the decree.

[Stanley, C. J. How do you distinguish the case of *Kalyan Singh v. Thakur Das*, 1905, A. W. N., 87. We are not prepared to reconsider the question, which has been so recently decided. The Calcutta and the Madras High Courts have also taken the same view.]

The judgment of the court was delivered by

STANLEY, C. J.—The main question raised in this appeal is whether a claim for possession of property, purchased by a decree-holder in execution of his own decree, can be enforced by a separate suit or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure. The property of which possession is sought to be recovered falls a little short of a 4 anna undivided share of a certain village, which was purchased by the decree-holders on the 20th of April 1895. That property is in the possession of the appellant, Sheo Narain, under a deed of gift from the widow of the judgment-debtor. No steps were taken by the purchaser to obtain possession until the month of February 1902, that is, nearly seven years after the date of the purchase, when he applied to the court for possession under section 318 of the Code. That application was rejected as being barred by limitation on the 1st of November 1902. The present suit was instituted in 1904 for a declaration that the share of the pro-

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perty in question was not subject to a mortgage which had been set up in a prior suit by Sheo Narain, and also for possession of it as unencumbered property.

The court of first instance dismissed the plaintiff's claim holding that the share in question was not unencumbered, and relying in support of his decision upon the memorandum of bids which was prepared by an *Amin*, in the office of the Deputy Collector, from which it appeared that the property sold was subject to a mortgage for a sum of Rs. 148. On appeal the decision of the court of first instance was reversed, and thereupon a second appeal was preferred to this Court. The learned Judge, before whom the appeal came, upheld the decision of the lower appellate court, holding that there was no force in the contention raised on behalf of the appellant in that court, that the suit was barred by the provisions of section 244 of the Civil Procedure Code. He observes in the course of his judgment, "The mere fact that the auction purchasers, or their representatives, failed to apply within time to be put in possession under section 318 of the Code of Civil Procedure, does not deprive them of their right to bring a regular suit," and then quotes as an authority for this, the case of *Seru Mohun Bania v. Bhagoban Din Pande* <sup>(1)</sup>, and *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal* <sup>(2)</sup>. In neither of these cases was the purchaser the decree-holder as was the fact in the case before us. But there is no doubt that according to some early rulings the decision of the learned Judge would have been correct. Lately, however, several cases have come before this, and the other High Courts in which the early rulings have not been followed. The earliest of these to which we need refer is the case of *Madhusudan Das v. Gobinda Pria Chowthrani* <sup>(3)</sup>, in which it was held by Macpherson and Stevens, J. J. that proceedings for the delivery of possession to an auction purchaser, who was also the decree-holder, after sale in execution of her own decree, were proceedings in execution of the decree, and that when the application for possession was resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised came under section 244, and must be decided

(1) [1883] I. L. R., 9 Cal., 602.

(2) [1887] I. L. R., 14 Cal., 644.

(3) [1889] I. L. R., 27 Cal., 34.

under that section and not by a separate suit. The next case to which we would refer is that of *Kattayat Pathumai v. Raman Menon* <sup>(4)</sup>, in which a similar view was taken, it being held that proceedings, taken by an auction purchaser to obtain possession of property purchased by him at a sale in execution of his own decree, related to the execution, discharge or satisfaction of the decree within the meaning of section 244, and that a separate suit for possession was not maintainable. The question again came before this Bench in the case of *Kalian Singh versus Thakur Das* <sup>(5)</sup>, in which the question was carefully considered, and the decision of the Calcutta and Madras High Courts was followed. So far, therefore, as we are concerned, the question is concluded by authority. We do not think that we are unduly extending the scope of section 244, and we say this with the more confidence in view of the observations of their Lordships of the Privy Council in recent cases as regards the object and meaning of that section in which they express approval of the fact that the courts in India have not placed any narrow construction on its language *Prosunno Coommar Sanyal v. Kali Das* <sup>(6)</sup>.

For these reasons we must allow the appeal, and dismiss the suit with costs in all courts.

*Appeal decreed.*

(4) [1903] I. L. R., 26 Mad., 740.

(5) [1906] 26 A. W. N., 87., S. C., 3 A. L. J. R., 234.

(6) [1892] I. L. R., 19 Cal., 683.

M. L. S.

GORDHAN DAS AND ANOTHER

*versus*

CHUNNI LAL.\*

*Endowment—deed—construction—charitable purposes—not void for vagueness—parties—persons interested not being upon the record—effect of.*

Where a deed of endowment recited that the executant had established a *dharamshala*, for charitable purposes and he had carried on the charity : held that the trust was not void for vagueness. A trust for such purposes, that is, charity generally, will always be carried out notwithstanding that the objects of the charity are not specifically defined. *Ranchhordas v. Parvati Bai*, I. L. R., 23 Bom., 725, distinguished.

\*F. A. No. 199 of 1905.

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Where the court finds a properly constituted trust, the fact that the trust was not carried out would not have the effect of annulling it.

Where the plaintiffs in a suit ask for possession in the character of trustees of certain endowed property and omit to implead persons interested in a particular item of that property, they cannot in that suit obtain a decree declaring that property subject to the charge of maintaining the trust.

FIRST APPEAL from a decree of Lala Shankar Lal, Subordinate Judge of Agra.

Suit for possession of a village called Gauri on the allegation that it was endowed property. The deed of endowment was executed by Rai Joti Prasad on the 20th September 1861. It recited that he had established a *dharamshala* at Benares, and in order to make a permanent arrangement to carry it on, he endowed several villages. The plaintiffs claimed that Gauri was one of the villages which were endowed. This village, among others, remained in possession of the trustees appointed under the deed of 1861, after whose death it came into the possession of their widows. In 1903, a widow of one of the trustees sold the village to the defendant. She was removed from the office of trustee and plaintiffs were appointed in her place. They brought this suit for possession. The Subordinate Judge dismissed the suit.

Plaintiffs appealed.

*Sunder Lal*, with him *S. C. Banerji* for the appellant, submitted that the deed created an endowment over the *corpus* of the property, (the average income thereof was about Rs. 6,000 a year), and not over a portion of the income only. In any event, the appellants were entitled to Rs. 500 a month, and they could claim it from any of the properties comprised in the deed. The defendant was therefore to pay Rs. 500 a month as he was the purchaser of one of the properties, *viz.*, *Mowzah Gauri*. The decree of the court below was quite wrong on the findings, and could not be sustained.

*J. N. Chaudhri*, (with him *M. L. Agarwala* and *Kedar Nath*) for the respondent, submitted that the word "*punya*" used in the deed was too vague to be the basis of a charitable endowment, as the trustees could use the money for any one out of an unlimited number of objects. He cited

*Runchordas v. Parvati Bai*, [1899] I. L. R., 23 Bom., 725.

There the word 'dharma' was held to be too vague. The word 'punya' is equally vague. There was no evidence that the endowment was ever meant to be acted upon or was ever acted upon. The properties continued to be recorded in the revenue registers as if they had not been endowed. He relied upon

*Suppammal v. The Collector of Tanjore*, [1889] I. L. R., 12 Mad., 387.

Lastly, he submitted that the frame of the suit was misconceived. If the plaintiff desired to have the endowment declared, he should have framed the suit so as to have all the properties and their present owners before the court, so that a proper scheme for administration could be settled. The prayer for possession was clearly wrong; and that being the case and all the parties not being before the court, they could not ask the court to charge one of the properties with the entire burden or to apportion the charge over the several villages.

*Sundar Lal*, in reply. The objection, as to non-joinder of parties, was too late. It should have been taken at or before the first hearing.

[Stanley, C. J. A sufficient answer to that was that the respondent did not plead non-joinder but objected to the frame of the suit.]

The judgment of the court was delivered by

STANLEY, C. J. This is an appeal by the plaintiffs against a decree of the Subordinate Judge of Agra, in a suit brought by them as trustees for a declaration that certain property was endowed, and that the plaintiffs as such trustees might be put into possession of the village of Gauri, a portion of the endowed property. The court below, while dismissing the plaintiff's claim for possession, gave a declaration that mouzah Gauri was charged with and subject to an annuity of Rs. 133-5-0 for the support of the alleged charity, and that the plaintiffs were entitled to realise this sum from the defendant during the continuance of the charity. Against this decree, the plaintiffs have appealed. We have also before us an objection filed by the defendant respondent, under Section 561 of the Code of Civil Procedure, the ground of objection being that the property is not endowed property.

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The deed of endowment upon which the plaintiffs rely was executed by Rai Joti Prasad of Agra on the 20th of September 1861. In that document there is a recital that the executant had established a *dharamshala* at Benares for charitable purposes, and had carried on the charity at a cost of Rs. 500 a month. Then it is recited that it was necessary to make a permanent arrangement for the continuance of the charity and for meeting the expenses connected with it, and that therefore the document was executed. In the operative part Joti Prasad purported to set apart the profits of seven villages, one of which is Gauri, for the expenses of the *dharamshala* and directed that the net profits of those villages should, to the extent of Rs. 500 a month, be applied to charitable purposes (*punya*) at the *dharamshala* and that the net profits of the villages should be deposited by way of trust with Bishambar Nath and Din Dial or those whom they might appoint.

After the deaths of the trustees, their widows Rani Kanno Dei and Rani Hira Dei took upon them the management of the property comprised in the deed of endowment, and on the 12th of January 1903, Rani Hira Dei sold the village of Gauri to the defendant, Seth Chunni Lal, who is now in possession of it. By order of the 25th of January 1904, Hira Dei was removed from the office of trustee and the plaintiffs were appointed trustees of the endowment. The suit out of which this appeal has arisen was then brought by them on the 17th of May 1904 and it is only concerned with the village of Gauri, the plaintiffs claiming possession of it alone. Seth Chunni Lal alone defended the suit and his sole defence was that the property in dispute was not endowed property, and that the alleged deed of endowment was never acted on.

The learned Subordinate Judge held, and we think rightly, that only a portion of the profits, that is Rs. 500 a month, of the villages mentioned in the deed of endowment was dedicated for the purposes of the trust, and that the villages themselves were not vested in the trustees so as to entitle them to possession of them. The founder of the trust directed that the net profits of the villages to the extent of Rs. 500 a month only and not the corpus should be applied to charitable

purposes, and be deposited by way of trust with the trustees. The plaintiffs, we think, are clearly not entitled to be put into possession of any of the villages. They are only entitled to receive Rs. 500 a month out of the profits of them. Their suit for possession was, therefore, misconceived. The learned Subordinate Judge came to the conclusion upon the evidence that Rs. 500 a month were never expended in the expenses of the charity but that possibly the expenses might have been about Rs. 166 a month, and he held that the villages were only subject to a charge of Rs. 130 a month for the charity. His words are "I think it may be taken that the income of the villages in the *bhetnama* is subject to a charge of Rs. 130 a month for charity at Benares". He further found that the proportionate part of the charge, attributable to the village of Gauri, was a sum of Rs. 133-5-0 yearly. Accordingly, he gave a decree for this amount.

The plaintiffs appellants appeal against this decree contending that the village of Gauri was endowed property, and that upon the true construction of the *bhetnama*, the *corpus* of the villages should have been held to be dedicated, and also relying on other grounds which it is unnecessary here to refer to.

Mr. *Chaudhri*, on behalf of the respondent, supporting an objection, filed under section 551 Code of Civil Procedure, contended that there was no valid endowment at all, the purposes of the trust being too indefinite and vague, and also that if the endowment was valid, it was never acted on. He further objected to the form of the decree.

As to the first point raised by him, namely, that the trust could not be enforced, that the words translated "charitable purposes" are too vague and indefinite to create a valid trust, he relied upon the ruling of the Privy Council in the case of *Runchordas v. Parvati Bai* <sup>(1)</sup>, in which it was held that a bequest by a Hindu testator of moveable and immoveable property to trustees for "*dharm*" was void. The word "*dharm*," as was pointed out in that case, indisputably bears a broad signification, being so wide as to include philanthropy or piety or charity. In Wilson's Glossary of

(1) [1899] I. L. R., 23 Bom., 725.

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Judicial Terms '*dharm*' is defined to be 'law' 'virtue' 'legal or moral duty'. Their Lordships held that the objects, which can be considered to be meant by that word, are too vague and uncertain for the administration of them to be under any control. The dedication in the case before us is for charitable purposes (*punya*) and for charitable purposes alone. A trust for such purposes, that is, for charity generally, will always be carried out, notwithstanding that the objects of the charity are not specifically defined. The court can, if necessary in such a case, settle a scheme for its proper administration. There is nothing, therefore, in the first point which has been raised before us.

The next point argued by Mr. *Chaudhri* is that the evidence fails to show that the endowment was ever acted on, and reliance is placed upon the decision in the case of *Suppammal* versus *The Collector of Tanjore* <sup>(2)</sup>. It will be seen from a reference to the judgment in that case that the evidence so far from indicating an intention to constitute a trust, went to show that the parties never intended to give effect to the provisions of the deed, in fact the court found that a trust was not created. In the course of his judgment, Shephard, J., observes—"It is true that neglect or breach of trust (*sic*) on the part of the trustees in acting, in accordance with the direction of the founder, could not have the effect of annulling a properly constituted trust". We gather from this that if the court had found that there was a properly constituted trust, the fact that the trust was not carried out would not have the effect of annulling it. We think that the court below rightly decided that the trust existed.

Then the learned Advocate for the respondent contended that in view of the frame of the suit, the plaintiffs were not entitled to the decree which they obtained for payment of a proportionate part of the charge created by the deed of endowment. We think that this branch of his argument is well founded. The relief which the plaintiffs claim is that they may be put into possession of the village of Gauri. They did not implead the persons who are interested in the other villages which are subject to the trust and as they failed to establish their title to possession, it seems to us that it was

(2) [1889] I. L. R., 12 Mad., 387.

sub

not open to them to ask the court to apportion the charge over the several villages, and to declare the village of Gauri liable to a specific portion of that charge. If their suit had been a suit for a declaration that the village of Gauri, together with the other villages named in the *bhetnama*, were charged with the monthly payments mentioned in the instrument, and for an apportionment of that charge, the plaint would have assumed a different form. The prayer for any other relief, which might be deemed just, contained in the plaint, did not, as has been argued, justify in our judgment, the court below in deciding as it did that Gauri was liable to a definite portion of the charge. In view of the frame of the plaintiff's suit, we think that it ought to have been dismissed, notwithstanding that the plaintiffs may be able to establish that the village of Gauri is subject to a charge of Rs. 500 a month, for the charitable purposes, mentioned in the trust deed. It will be open to the plaintiffs to institute a suit in the proper form.

We dismiss the appeal, set aside the decree of the court below and dismiss the plaintiff's suit. As the sole defence set up by the defendant was that the property was not dedicated, and as he has maintained this defence in his objection, we think that in the court below the parties should abide their own costs. We now so order. We give the defendant respondent the costs of this appeal, including fees in this Court on the higher scale. We give no costs of the objection.

*Appeal dismissed.*

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KNOX, A. C. J.  
DILLON, J.

## BALWANT SINGH

*versus*

GIRDHARI LAL AND OTHERS.\*

*Jurisdiction—Civil and Revenue Court—Landlord and Tenant,—Agra Tenancy Act (II of 1901) U. P., Section 79—order in ejectment—suit in civil court by lessee of a tenant—res judicata.*

An occupancy tenant leased his land to the plaintiffs. Subsequently he relinquished his rights in favour of the *zemindar*. The *zemindar* took proceedings in the revenue court and got the plaintiffs ejected and put other persons as tenants of the land in dispute. In the meantime he continued to take rent from the lessees but without prejudice to his contesting the lease. *Held*, that a relation of landlord and tenant subsisted between the parties up to the date when the landlord got the lessees ejected. The suit of the lessees for possession was consequently a case which was cognisable by a revenue court, and was therefore barred by the rule of *res judicata* on account of the judgment of the revenue court in ejectment proceedings.

SECOND APPEAL against the decree of Babu Chajju Mal, Subordinate Judge of Aligarh, affirming a judgment of Babu Gokul Prasad, Munsif of Hathras.

Kalwa was an occupancy tenant of the land in dispute which belonged to the defendant, Raja Balwant Singh, C. I. E. In 1898, he executed a *sar-i-peshgi* lease of his right to occupy in favour of the plaintiffs for a certain number of years. In 1901, Kalwa relinquished his occupancy rights in favour of the Raja. The plaintiffs brought a suit in the court of the Munsif, and got a decree declaring their right to remain in possession for the unexpired term of the lease. The defendant instituted proceedings in the revenue court, and got the plaintiffs ejected, and let the land to other tenants, on 9th December, 1902. On 10th December, 1903, the present suit was brought for possession, under the terms of the *sar-i-peshgi* lease. The courts below decreed the suit.

Defendant appealed.

*S. C. Banerji* (for *J. N. Choudhri*), for the appellant. The plaintiffs were transferrees from a tenant. If they pay rent to the *zemindar*, they are *zemindar's* tenant; if they pay rent to his lessor, they are *zemindar's* sub-tenant. In the former case, if the *zemindar* turned them out wrongfully, they must sue the *zemindar* in revenue court to recover possession. In the

\* S. A. 1062 of 1905.

latter case, in the same event, their dispossession tantamounts to dispossession of the occupancy tenant, who must sue within 6 months. The occupancy rights in this case have determined; first, because there was a valid surrender and no fraud was proved, and secondly, because occupancy tenant did not bring any suit within six months.

*Pahalwan Singh v. Satrupa Kuar*, [1905] 2 A. L. J. R., 471.

As to the effect of civil and revenue court decisions, the judgment of 12th March 1902 should be treated as civil court judgment. Where two judgments are in conflict the later in time should prevail.

*Mallu Mal v. Jhamman*, [1904] 1 A. L. J. R., 416.

The order of 22nd September 1902 operates as *res judicata*. Therefore the present suit is cognisable by revenue court. Order passed *inter parties* by a duly constituted court cannot be treated as a nullity. The revenue court was competent to decide, if relation of landlord and tenant existed between the parties and its finding that such relation did exist can be set aside only by appeal. An *ex parte* decree is binding on the parties.

*Gulzari Lal*, for the respondents relied on section 40 of the Rent Act XII of 1881, and submitted that the relation of landlord and tenant did not subsist between the parties, and consequently a civil court had jurisdiction to hear the case. The orders of a revenue court cannot operate as *res judicata*. He cited

*Khiuli Ram v. Nathu Lal*, [1893] I. L. R., 15 All., 219.

*Badri Pasad v. Sheo Dhian*, [1896] I. L. R., 18 All., 354.

[Knox J. referred to *Mahesh Singh v. Ganesh Dube*, I. L. R., 15 All., 231.]

*Brij Mohan Das v. Algu*, [1903] I. L. R., 26 All., 78.

*Rannu Rai v. Raft-ud-din*, [1904] I. L. R., 27 All., 82.

*Gokul Mandar v. Padma Nand*, [1902] I. L. R., 29 Cal., 707.

The judgment of the court was delivered by

DILLON, J.—This appeal arises out of a suit brought by Girdhari Lal and others against Raja Balwant Singh, first party, Ishri Singh and Bhikey Singh, second party, and Kalwa, third party. The suit was brought in the court of the Munsif of Hathras. Raja Balwant Singh is the landholder of the

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*Dillon, J.*

land in dispute. Kalwa was a tenant with a right of occupancy. The plaintiffs are mortgagees from Kalwa of a right to occupy Kalwa's land until his tenancy is determined or the mortgage debt is paid. Ishri Singh and Bhikey Singh are tenants whom the landholder has recently, as we shall hereafter show, admitted as tenants into the land occupied by Kalwa.

If will facilitate the decision of this appeal if we set out first the transactions between the parties.

On the 9th of November 1898, Kalwa being a tenant with a right of occupancy, executed what is known as a *zar-i-peshgi* lease in favour of the father of the present plaintiffs. This transaction, according to the Full Bench Ruling of this court, *Khiali Ram v. Nathu Lal*, <sup>(1)</sup> does not amount to a transfer of the right of occupancy inasmuch as a transfer was expressly forbidden by section 9 of Act XII of 1881. It is the sub-letting by the occupancy tenant to the mortgagees of that tenant's right to occupy that land, a right which determines on the determination of the right of occupancy and can subsist no longer than the right of occupancy subsists. A subsequent Full Bench ruling, *Mahesh Singh v. Ganesh Dube* <sup>(2)</sup>, held that the sub-tenant by such sub-letting did not become the tenant of the *semindar*. To avoid constant repetition in this judgment, we shall hereafter allude to this sub-letting by Kalwa as the sub-letting of his right to occupy.

This transaction on the part of Kalwa, as will be seen by the subsequent history of the case, was never recognised by the *semindar*. On the 16th February 1901, Kalwa relinquished his tenancy by deed in favour of the *semindar*. No sooner had he done this then the plaintiffs filed a suit in the court of the Munsif of Hathras to have this deed of relinquishment set aside, and to be maintained in possession as "sub-lessees". To this suit they made Raja Balwant Singh a party. This move on the part of the plaintiffs was met by a counter move on the part of the landholder who caused a written notice of ejectment to be served on the plaintiffs, in accordance with the provisions of section 36 of Act XII of 1881.

(1) [1893] I. L. R., 15 All., 219. (2) [1893] I. L. R., 15 All., 231.

On the 13th May 1901, the Munsif decided that the deed of relinquishment was void as against the plaintiffs, that they were entitled to be retained in possession for the unexpired term of the lease, and he granted the plaintiffs possession as "sub-lessees" for the term of the lease. In the meanwhile the plaintiffs had, before the rent court, contested their liability to be ejected, but the question was determined adversely to them, first on the 12th of March 1902, and subsequently on the 14th of August 1902 in appeal.

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In the meanwhile the local Act II of 1901 had come into force and apparently the land-holder who wished to eject a tenant on grounds other than an unsatisfied decree for arrears of rent, had to proceed by suit. Accordingly the land-holder instituted a suit under section 63 of the local Act No. II of 1901 in which he asked for the ejectment of the present plaintiffs. This suit was apparently not defended by the plaintiffs. The Assistant Collector held that they were liable to ejectment, and passed an *ex parte* decree against them. In his opinion their status was that of sub-tenants of Raja Balwant Singh. Raja Balwant Singh took out execution proceedings, dispossessed the present plaintiffs on the 9th December 1902, and let the land to Ishri Singh and others, defendants' second party in the present suit. On the 10th December 1903, the present plaintiffs instituted the suit out of which this appeal has arisen. Their prayer was that they should be put in possession under the terms of the *sar-i-peshgi* lease in their favour, and that the defendants, second party, should be ejected from the same.

The courts below have decreed the plaintiffs' suit. They held that the suit was cognisable by the civil court, that the orders of ejectment passed by the courts of revenue did not operate as *res judicata* inasmuch as there was no relation of landholder and tenant between the plaintiffs and Raja Balwant Singh.

In appeal before us two points were taken. First, that the decisions of the Revenue Courts do operate as *res judicata* and do debar the respondents from maintaining the present suit. Second, that the status of the plaintiffs was that of sub-tenant, and that they had no higher rights than were

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enjoyed by their mortgagor, Kalwa. We found upon perusal of the judgments of the courts of revenue which were filed in the present suit, and especially from the judgment of the Commissioner, dated the 14th August 1902, that as a matter of fact the plaintiffs had, since 1306 Fasli, made payments of rent to the landholder and that he had received such rents but without prejudice to his contesting the sub-lease which Kalwa had executed in favour of the plaintiff. In order to free the case from any doubt, we sent for the records and we find on perusing them that this is the case. We, therefore, hold that the relation of landlord and either tenant or a sub-tenant has existed between the parties since 1306 Fasli (1899), and that it subsisted between the parties upto 9th December 1902, when the landholder succeeded in dispossessing the present plaintiffs. The suit of the present plaintiffs must be taken to have been a suit under section 79 of the Local Act II of 1901, at any rate it was a suit of the nature specified in that section, and by section 167 of the same Act, except by way of appeal, no court other than the revenue court could take cognisance of it. The result of this is that we must also hold that the proceedings of the revenue courts in ejectment bar the determination of the issues, which are raised in this suit. The revenue courts, which decided the suits in ejectment, were courts of competent jurisdiction to try and determine both the suits then before them and also the present suit, and by the provisions of section 96 of Act No. XII of 1881, the orders passed on applications for ejectment when proved, as they have been in the present case, have the same effect as the judgments of a civil court. The first plea, therefore, is decided in the appellant's favour.

This decides the appeal. The result is that we decree the appeal, set aside the judgments of the courts below and dismiss the plaintiffs' suit with costs in all courts.

*Appeal decreed.*

X.

## BANARSI PERSHAD

*versus*

RAM NARAIN AND OTHERS.\*

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1907.

December, 2.

STANLEY, C. J.  
BURKITT, J.

*Decree—suit to set aside—No fraud—Right to sue—Code of Civil Procedure (Act XIV of 1882), section 447—Next friend ceasing to be a guardian under the Guardian and Wards Act—*

H instituted a suit for redemption which was decreed. The decree was affirmed on appeal by the High Court. On appeal to the Privy Council, the decree of the High Court was reversed, the Privy Council directing that an account should be taken of the defendants' receipts and payments under the mortgage deed and the ultimate balance due should be certified. H had died before the High Court gave its decision, and his three minor sons were substituted on the record, and their mother appointed as their next friend. She had also been appointed by the District Judge as their guardian under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, the High Court transmitted their order to the court below under section 610 of the Code of Civil Procedure with directions to carry it into execution. A pleader appeared for the minors in these proceedings but on the 9th of May 1905, after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, the pleader informed the court that he had no instructions and could not proceed further. The court, however, after considering the accounts passed a decree on the 16th of May 1905. Meanwhile the mother of the minors had made an application to the District Judge stating that one of the minors had attained majority and praying that he might be appointed in her place, guardian of the other two minors. This application was granted on the 3rd of February 1904. The Subordinate Judge was not informed of this, nor was any application made on behalf of the two minors for substitution of their major brother as their next friend in place of their mother, who accordingly continued to be their next friend in the case pending before the Subordinate Judge. Then the major son of H applied on his own behalf and on behalf of his minor brothers for a re-instatement of the case and a rehearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the Subordinate Judge. This application was refused and no appeal was made against the order refusing it. Then the present suit was commenced, the sole prayer for specific relief being that the decree of the 16th of May 1905 may be set aside.

*Held* that the suit did not lie inasmuch as the only relief claimed was that the decree passed by the court may be set aside. Even

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if fraud on the part of the defendant had been alleged, the court would not have any jurisdiction to set aside the decree. If other relief had been prayed for, and there were proof of fraud in obtaining the decree, it might be open to the court to treat the decree as a nullity and to give suitable relief. But fraud not having been alleged or proved and no specific relief having been asked for, except the setting aside of the decree, the suit could not be decreed. *Umrao Singh v. Hardeo and another*, I. L. R., 29 All., 418 referred to

FIRST APPEAL against the decree of Pandit Girraj Kishor Datt, Subordinate Judge of Bareilly.

Suit to set aside a decree.

The material facts appear from the judgment. The Court below decreed the suit.

Defendant appealed.

*Motilal Nehru* (with him *Sundar Lal* and *Gulzari Lal*), for the appellant relied on

*Ganga Ram v. Mih'n Lal*, [1905] 3 A. L. J. R., 187.

*Puran Chand v. Sheo Datt Rai*, [1905] 4 A. L. J. R., 51.

*Umrao Singh v. Hardeo*, [1907] I. L. R., 29 All., 418.

and sections 446 and 447 of the Code of Civil Procedure.

*Madan Mohan Malaviya* (with him *Sital Prasad Ghose*) was heard in reply.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—This appeal arises out of a suit to set aside a decree passed by the Subordinate Judge of Bareilly on the 15th of May 1905 in a redemption suit. The former suit was instituted so far back as the 6th of April 1895, and was a suit for redemption of a mortgage and for accounts. The plaintiff in that suit was Kunwar Hulas Singh, the father of the present plaintiffs respondents. The suit was decreed, and redemption allowed. The matter came before the High Court on second appeal when this Court affirmed the decree for redemption and directed accounts to be taken on the basis of the gross rental and not upon the basis of actual profits. An appeal was preferred to his Majesty in Council, and a decree was passed by the Privy Council on the 25th of March 1903. The case is reported in the Indian Law Reports, 25 All., 387. Upon the

question as to the principle upon which the accounts should be taken, their Lordships of the Privy Council reversed the decision of this Court, holding that the defendant mortgagee was not responsible for the amount of the gross rental as shown in the *jamabandi* but only for such sums as were actually received by him or on his behalf, and such further sums, if any, as might have been received by him but for his own neglect or fault. Their Lordships accordingly directed that an account should be taken of the defendants' receipts and payments under the mortgage deed and that the ultimate balance due to or from the defendant should be certified. We should mention that prior to the decision of the appeal in this Court, the appellant Kunwar Hulas Singh died. His three minor sons were brought upon the record as his representatives, his widow Musammat Mulo being their next friend. In addition to being next friend of her minor sons in this litigation, Musammat Mulo was also on the 30th of April 1900, appointed by the District Judge as guardian of their persons and property under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, namely, on the 20th of July 1903, the High Court transmitted their order to the court below, under section 610 of the Code of Civil Procedure, with directions to carry it into execution. In these proceedings a pleader, named Lekhraj Singh, appeared for the minors, filing his *vakalatnama* as pleader for them, and for their next friend. He appears to have acted as such up to the 9th of May 1905. On that day after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, Lekhraj Singh informed the court on the day fixed for the hearing that he had no instructions, and could not proceed with the hearing. The court, intimating that the accounts had been filed and all that remained to be done was to examine them, adjourned the hearing, considered the accounts, and passed a decree on the 16th of May 1905. Meanwhile, Musammat Mulo had made an application to the court of the District Judge, stating that her son Ram Narain had attained his majority, and that she was incapable of attending to the affairs of the minors, and praying that she might be discharged from the post of guardian of their persons and property, and that Ram Narain might be appointed guardian in her place. The application was granted on the

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*Stanley, C. J.*

3rd of February 1904. No intimation, however, was given to the Subordinate Judge of the fact that Ram Narain had been appointed guardian in the place of Musammat Mulo, and no application was made on behalf of the minors for the substitution of his name as next friend in the suit which was then pending. This being so, Musammat Mulo continued to be the next friend for the purposes of the suit. The decree of the 16th of May 1905 did not satisfy the plaintiffs, and an application was made by Ram Narain on behalf of himself and his brothers for a re-instatement of the case and a rehearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the learned judge. The Subordinate Judge refused this application for reasons which it is not necessary to criticise.

No appeal was taken from his order, though it was appealable; and the decree of the 16th of May 1905 has become absolute. The suit, out of which the present appeal has arisen, was then launched, the sole prayer for specific relief being that the decree of the 16th of May 1905, may be set aside. The learned Vakil for the respondents has been unable to refer us to any authority for the bringing of a suit in which the only relief claimed is the setting aside by a Subordinate Judge of a decree passed by his predecessor. It is true that the plaintiffs claimed any other relief which might be just, but we do not think that this general prayer would justify us in passing of an order which would have the effect of annulling a decree against which no appeal was preferred. Even if fraud, on the part of the defendant appellant, had been alleged, we do not think that the court would have any jurisdiction to set aside the decree. If other relief had been prayed for and there were proof of fraud in obtaining the decree, it might be open to the court to treat the decree as a nullity and to give suitable relief. But in this case fraud is neither alleged nor proved, and no specific relief is asked for, save and except the setting aside of the decree. On this subject we may refer to the ruling of this Court in the case of *Umrao Singh v. Hardeo and another* (1). The learned Subordinate Judge appears to us to have been under a misconception as to the difference between a next friend, acting for minor plaintiffs in a suit, and

(1) [1907] I. L. R., 29 All., 418.

a guardian appointed over the persons and properties of minors under the Guardian and Wards Act. He says in the course of his judgment that "the guardian's name nominally remained as guardian in suit No. 52 of 1895 after the 3rd of February 1904, when Musammat Mulo was removed from guardianship, and Ram Narain, the plaintiff, was declared an adult, and was appointed guardian of the other plaintiffs by order of the District Judge of Bareilly." He then held that if the plaintiffs had not been properly represented in the proceedings which resulted in the decree, the present suit was maintainable. He evidently considered that when Musammat Mulo was removed from the guardianship under the Guardian and Wards Act, she ceased to act as next friend of the minors in the pending suit. Such was not the case. *Mr. Motilal* has pointed out the course which should have been adopted by the parties, if she had desired to retire from the office of next friend in the pending suit. Section 447 of the Code of Civil Procedure directs that a next friend shall not retire at his own request without first procuring a fit person to be put in his place, and without giving security for the costs already incurred. This provision of the Code was absolutely ignored by the parties. The Subordinate Judge seems to have considered that the appointment of Ram Narain, by the District Judge as guardian under the Guardian and Wards Act, was tantamount to his appointment as next friend for his minor brothers in the suit before the Subordinate Judge. We are not able, clearly, to understand the order which has been passed by him. Whilst setting aside the decree, which is the only relief which was sought, he has given a direction that the suit No. 52 of 1895, that is the former suit, is to be restored to its original number in the file and that inquiries be made in accordance with the order of their Lordships of the Privy Council. We think that the suit was misconceived and that this appeal must be allowed. We allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts, including fees in this court on the higher scale. We extend the time for payment of the amount due by the plaintiffs up to the 3rd January 1908.

*Appeal allowed.*

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December, 5.

KNOX, J.  
BANERJI, J.  
RICHARDS, J.

## IN THE MATTER OF ANANT RAM AND OTHERS\*.

*Code of Criminal Procedure (Act V of 1898), section 4 (v)—Mukhtars—meaning of—right to practise—Legal Practitioner's Act (XVIII of 1879), section 9—powers of Mukhtars.*

*Per curiam*—A Mukhtar cannot, as a matter of right, practise in criminal courts. He can only do so if he obtains the permission of the court in each case. The word 'Mukhtar' in clause (v) Section 4 of the Criminal Procedure Code also refers to such mukhtars as have obtained a certificate of qualification from the High Court.

Where the District Magistrate issued a notice that "Mukhtars can appear under section 4 (v) only with the court's permission" held that he did not act without jurisdiction.

*Per BANERJI, J.*—If permission, to act in a criminal case, is asked for by a Mukhtar, who holds a certificate empowering him to practise, such permission should not be refused except for valid reasons.

*Per RICHARDS, J.*—In considering whether or not permission should be granted to a Mukhtar, who has qualified himself with a certificate provided by the Legal Practitioners' Act, the court ought to consider every application on its merits.

In a judgment the Additional Sessions Judge of Meerut remarked that the definition of pleader in the Code of Criminal Procedure did not include a *mukhtar* and that a *mukhtar* must obtain permission from the Court before he could appear in a case. A copy of this judgment was sent to the District Magistrate for circulation among the Subordinate Courts. The District Magistrate thereupon issued a notice to the effect that *mukhtars* could not appear in any case except with the court's permission. Pandit Anant Ram and three other Mukhtars applied to the High Court to set aside the order.

*C. C. Dillon* for the applicants contended that having obtained a certificate from this Court entitling them to practise, it was not necessary for the *mukhtars* to obtain special permission in every case. The word '*mukhtar*' in section 4 cl. (v) of the Criminal Procedure Code meant a *mukhtar* who had not obtained a certificate of qualification. He alone should obtain permission before he could be allowed to appear. But a *mukhtar* enrolled as such by this Court after having obtained a certificate was not the person contemplated by the legislature when drafting section 4 (v) of the Criminal Procedure Code. He relied on

\* *Mis.* 69 of 1907.

*Imperatrix v. Sheo Ram Gundoo*, (1881) I. L. R., 6 Bom., 14.

*A. E. Ryves* in supporting the order of the Magistrate submitted that *mukhtars* could not rank with pleaders. In the draft of Act V of 1898 (Criminal Procedure Code) it was thought of classing *mukhtars* with pleaders but the bill when passed was changed. This showed that *mukhtars* must obtain permission from the court in every case. They could not oust better class of men *i. e.*, Vakils and pleaders. There was no order prohibiting the *mukhtars* to practise. There was no allegation that any *mukhtar* was refused permission to appear. The order could not be revised.

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The following judgments were delivered.

KNOX, J. The Additional Sessions Judge of Meerut in an appeal pending before him entered in his judgment the following observation. "All accused persons are as of right entitled to be defended by a pleader and the definition of "pleader" in the Criminal Procedure Code does not include *mukhtars*; special permission of the court has to be obtained for the representation of an accused person by other than a pleader; but Magistrates seem to take it as a matter of course that *mukhtars* should appear. While this is so, the standard of morals in the courts can never improve. I dismiss this appeal and order that a copy of this judgment be sent to the District Magistrate for information." Upon receipt of this, the District Magistrate of Muzaffarnagar issued the following order:—"Mukhtars can appear under section 4 (1)—only with the court's permission. Draw all courts' attention to this section."

*Knox, J.*

It is contended before us that both these orders, namely, the order of the Additional Sessions Judge of Meerut and the order of the District Magistrate of Muzaffarnagar were made without jurisdiction. This contention is raised by certain *mukhtars* of the Muzaffarnagar district, who are represented in this Court by learned Counsel. The learned Counsel in opening his case boldly claimed for his client the right to appear whether with or without permission in criminal courts. His argument was that the words, contained in the clause of the Code of Criminal Procedure quoted above, did not refer to a *mukhtar*, who has obtained a certificate from this Court authorising him to practise in criminal subordinate courts. He wished us to read the words 'appointed with the per-

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mission of the Court to act in such proceeding' as qualifying the immediately preceding words 'other persons' and as not referring or qualifying the words 'any Mukhtar.' In the first place if that had been the intention of the legislature we should have expected to find words 'any Mukhtar' placed in group (1) clause (r) and not as they are in group (2) of that clause. There is a still further difficulty, which is an insuperable one and that arises out of the provisions of section 9 of Act No. XVIII of 1879. This section defines the powers given to Mukhtars on enrolment and provides that a person so enrolled "may practise as a Mukhtar in any such civil court and any court subordinate thereto and may, subject to the provisions of the Code of Criminal Procedure, 1882, appear, plead and act in any such criminal court and any court subordinate thereto." The language here used shows that the legislature intended to draw and did draw a distinction between the privileges of a Mukhtar when practising in a civil court and his privileges when practising in a criminal court. In the latter case those privileges are subject to the provisions of the Code of Criminal Procedure 1882, that is to say, including and in addition to other provisions, the provision that he can only act when he has received the permission of the court to act in a particular proceeding. The history of the genesis of this provision in clause (r) confirms the view we take of the intention of the Legislature. The learned Government Advocate pointed out that when Act No. V of 1898 was still in the stage of a bill and before the Legislative Council the draft proposed to confer upon Mukhtars the very privileges, which are contended for here. But when the bill passed into law the provisions which had prevailed under Act No. X of 1882 were replaced in Act No. V of 1898 without any change. All that the learned Additional Sessions Judge has done in his judgment is to draw the attention of the Magistrate, subordinate to him, to clause (r) of section 4 of Act V of 1898 intimating that these provisions apply to Mukhtars holding certificates. The District Magistrate has done nothing more than to draw the attention of the subordinate courts on the subject. We cannot say that in either order the courts concerned acted without jurisdiction or contrary to law.

BANERJI, J.—I entirely agree. At the same time I am of opinion that if permission to act in a criminal case be asked for

*Banerji, J.*

by a Mukhtar, who holds a certificate, empowering him to practise in criminal courts, such permission should not be refused except for valid reasons, and having regard to the circumstances of the particular case and of the particular Mukhtar who applies for permission.

RICHARDS, J.—I also agree in what has been said by *Sir George Knox* and Mr. *Justice Banerji*. I think in considering whether or not permission should be granted to a Mukhtar, who has qualified himself with the certificate provided by the Legal Practitioners' Act, the Court ought to consider every application on its merits. Mukhtars cannot expect or claim all the privileges of Vakils and Advocates who have had to qualify themselves after much study and expense. This is what is really claimed on behalf of the present applicants. On the other hand there must be many occasions when the difficulty of obtaining the services of an advocate or pleader will be very great, and perhaps, having regard to the means of an accused person and distance, practically impossible. All these are matters, which I think the court might fairly take into consideration when granting or withholding permission to a Mukhtar, holding the certificate mentioned in the Legal Practitioner's Act, XVIII, of 1879.

B. C. M.

*Application refused.*

MAHADEI

*versus*

BALDEO.\*

*Hindu Law—Reversioners—Compromise by a widow in suit followed by decree—effect of—*

*Held*, following *Gobind Krishn Narain v. Khunni Lal* (1907) *A. W. N.* 151 that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding, on the reversioners, even though it has been followed by a decree of court, and that the reversioners can only be bound by a decree made after a full contest.

APPEAL under section 10 of the Letters Patent against the decision of Aikman, J.

\* L. P. A. No. 35 of 1907.

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*Richard, J.*

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STANLEY, C. J.  
BURKITT, J.

CIVIL.

1907.

MAHADEI

v.

BALDEO.

The judgment of Aikman J., is reported at page 490 of the fourth volume of the Allahabad Law Journal Reports. The facts shortly, were as fallows:—The property in dispute originally belonged to one Dayal who died leaving a widow, Anandi, a son, Surajdin, and a daughter, Sukhdei. On Surajdin's death his widow, Batasia, took possession of the whole estate. Anandi instituted a suit for a share in the property. The suit was compromised and under the decree which was passed in terms of the compromise, Anandi got a third share in the property. On Batasia's death the plaintiff, her daughter, brought this suit for possession. The lower appellate court decreed the suit but, on appeal to the High Court, Aikman, J., reversed the decree.

Plaintiff appealed.

*Govind Prasad*, for the appellant: A reversioner is not bound by a compromise entered into by a Hindu widow. He is only bound by a decree in a contested suit. The fact that the property is of a small value makes no difference in law. The judgment is opposed to the ruling of a Bench of this Court in

*Govind Krishn v. Khunni Lal* [1907] A. W. N., 151.

*O'Connor*, for the respondent, supported the judgment of the Single Judge on the grounds given in it.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The decision of the learned Judge of this Court, against which this appeal is preferred, is wholly opposed to the principle laid down in the judgment of a Division Bench of this Court in the case of *Govind Krishn Narain v. Khunni Lal*, (1). In that case the Court held following earlier rulings and citing the leading case of *Stapleton v. Stapleton* (2) that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court and that the reversioners can only be bound by a decree made after a full contest in a *bona fide* litigation. This case was not reported until the 29th of May 1907, and does not appear to have been brought to the

(1) [1907] A. W. N. 151..

(2) White and Tudor's Leading Cases Vol. I. p. 230.

notice of the learned Judge. The fact that the property involved is of little value is a matter which cannot be taken into consideration in determining the rights of the parties. In view of the ruling above referred to, we must allow the appeal. We set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

*Appeal decreed.*

## THE MUNICIPAL BOARD OF BULANDSAHAR.

*versus*

DAKKHAN LAL.

*Municipalities Act (U. P. No. 1 of 1900), s. 88 (1)—Public street, meaning of—blind lane.*

Where it was proved that a *cul de sac* had been lighted, drained, and swept by the Municipality, and upon sale of the property of the former owner, the portion forming this lane had not been sold, and the public had been using it freely for thirty years, *held* that it was a public street within the meaning of section 88, sub-section 1 of the North-Western Provinces and Oudh Municipalities Act. Where, therefore, the Municipality ordered the demolition of constructions made upon it, and an injunction was asked for against interference with the lane, *held*, that the municipality acted within its rights and the injunction should not be granted.

SECOND APPEAL from the decree of Pandit Girraj Kishore Dat, Additional Subordinate Judge of Aligarh, reversing a decree of M. Mubarak Hussain, Munsiff of Bulandsahar.

Dakhan Lal, respondent, owned a house in a lane closed up at one end in mohalla Deputyganj in Bulandsahar. Just in front of his house and in front of the said lane the respondent built a cattle trough and a thatched shed. The Municipal Board thereon ordered the plaintiff respondent to remove the said erections. Plaintiff objected but his objections were overruled and the erections demolished. The plaintiff thereon brought this suit for a declaration of his right to build the constructions on the ground that the Municipal Board had no right to demolish them. The main defences to the suit were that plaintiff was not the owner of the site, that it was a public street and that the place on which the erections were made abuts on a public street. The Munsiff dismissed the

S. A. 349 of 1906.

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suit on the ground that the site adjoins a place belonging to the Municipal Board. He held that the suit fell, not under Sec. 88 but under Sec. 87 cl. (a), of the Municipalities Act. Plaintiff appealed and the appellate court reversed the decree of the munsif, holding that the lane was not a public street.

Defendant appealed.

*Ghulam Mujtaba*, for the appellant, referred to section 3 clause (4) of the Municipalities Act which defined 'street' and contended that the mere fact that the lane was closed at one end did not necessarily take it out of the definition. It would nevertheless be a 'street' if it was a place over which "the public" had a right of way. The word "public" was not defined in the Act X, but it was defined in the Indian Penal Code, section 12. He cited

*Kali Das v. The Municipality of Dhandhuka* [1882] I. L. R. 6 Bom., 686.

*The Anklesvar Municipality v. Rikhavchand* [1900] I. L. R. 25 Bom., 316.

*Queen Empress v. Sri Lal* [1895] I. L. R. 17 All., 166.

*Queen Empress v. Chote Lal* [1895] A. W. N. 127.

*Bachchu v. The Municipal Board of Benares* [1900] A. W. N. 128.

*Bhairon Nath v. The Municipal Board of Benares* [1901] A. W. N. 56.

*Girdhari Lal Agarwala*, for the respondent, referred to article 'Public way' in the Encyclopædia of the Laws of England Vol. 10 p. 582; Wharton's Law Lexicon p. 364 the word 'Highway' and submitted that a *cul de sac* was not a public street and the Municipality had no right to interfere in the erections made.

The judgment of the Court was delivered by

*Knox, J.*

KNOX, J.—The plaintiff, Dakkhan Lal who is respondent to this second appeal, was the owner of a house, which is situate in one of the inner lanes in the town of Bulandshahar. One end of the lane is closed, in other words, the lane is a *cul de sac*. In front of his house he erected some cattle troughs and a thatched shed. Complaint was made by some of the residents of the muhalla living opposite the plaintiff's house. This complaint was made to the Municipal Board and they served the plaintiff with a notice to remove the constructions which he had made, on the ground that they caused incon-

venience to the people of the muhalla and also injuriously affected the sanitation of the place. The plaintiff filed objections, which were over-ruled by the Board and he was ordered peremptorily to remove the troughs and the thatch. He failed to comply with this order, was prosecuted, admitted that he was wrong and was fined and he himself pulled down the erections that he had made. He then, instituted the suit out of which this appeal has arisen. He prayed for a declaration that the land, upon which he had built, was his own land and for an injunction to restrain the Municipality from interfering any further with it. He also prayed that the Municipality should be ordered to rebuild the erections or to pay damages.

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The court of first instance came to the conclusion that the land upon which the plaintiff had built, was his own private property and that he had not by the building, that he had made, encroached upon any street. It, therefore, held that the provisions of section 88 sub-section (1) of the North Western Provinces and Oudh Municipalities Act I of 1900, did not apply and that the Municipality were not justified under that section in the order which they had issued. But he held that they were justified, by section 87 of the same Act, in issuing the order. Whilst, therefore, he gave the plaintiff the declaration he asked for, he dismissed the rest of the claim. The plaintiff appealed. The learned Subordinate Judge allowed the appeal and decreed the plaintiff's claim in full. The Municipal Board has come here in second appeal.

The case has been well argued before us by the learned Vakils on both sides. They have taken us through the judgments and cited various authorities applicable to the question at issue. For the appellant it is contended that accepting the findings of fact arrived at by the court below, the conclusion of the learned Subordinate Judge to the effect that the lane was not a 'street' as defined by the Municipalities Act was wrong. The word "street" as used in the Act is defined in clause (4) section 3 as follows:—'Street' means any street road, thoroughfare, passage or place over which the public have a right of way and includes the footway and surface drains of any such street, any bridge, culvert or causeway forming part of any such street."



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We have to consider whether on the facts found, the place where the plaintiff made his constructions, is a place abutting or adjoining a 'street' within the meaning of this Act. We would first observe that the fact that the lane is a *cul de sac* does not prevent it from coming within the definition of 'street' so long as the public have a right of way over it. It appears from the evidence that upwards of thirty years ago a Deputy Collector, named Touchy was the owner of this property and that he erected houses and shops thereon. After his death, the houses and shops together with some land were sold by auction to different persons. The map shows that these houses and shops are situate on both sides of the lane, which is closed at the north end and that there are shops in the lane nearer the closed end than the plaintiff's house. There are also shops near the open end. This land has been lighted, drained and is swept by the Municipality. When the Touchy property was sold, the portion, which forms this lane, was not sold and has been freely used by the public for at least thirty years. Taking all these facts into consideration, we think the conclusion to be drawn from them, when viewd together is that the lane is a public street as defined in the Act. This being so, the Municipality were acting within their rights in passing the order complained of. For the above reasons, we allow the appeal with costs and setting aside the decree of the lower appellate court with costs restore that of the court of first instance.

B. C. M.

*Appeal decreed.*

SHEIKH ALAM.

*versus*

PARMANAND.\*

*Code of Civil Procedure (Act XIV of 1882), section 13—Res judicata—Decision on a preliminary point—appeal—set aside—Remand for trial on other issues—suit dismissed for default of parties.*

In a former suit for rent between the same parties the Collector on appeal held that a certain lease was inoperative and remanded the case for trial. It was then dismissed for default. *Held* in a subsequent suit for rent that the finding, although it was not embodied in the decree, operated as *res judicata* inasmuch as it was the basis of the Collector's order.

LETTERS PATENT APPEAL from the decree of Mr. Justice Griffin reversing the decree of A. Sabonadiere Esq., District

\* L. P. A. 33 of 1907.

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STANLEY, C. J.  
BURKITT, J.

Judge of Jhansi and restoring that of Babu Ram Pratap Singh, Assistant Collector, 1st class, of Jalaun.

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v.

PERMANAND.

This was a suit for arrears of rent. The defendant pleaded that he was not a tenant but had taken a farming lease from the Collector in execution of his decree against the plaintiff, for the payment of the decretal money by the usufruct. The plaintiff's answer to the plea was that in a previous suit for rent between the same parties it had been finally decided by the Collector on appeal that the farming lease was inoperative. The Collector had remanded that suit to the Court of first instance for trial on other issues but that Court dismissed the suit for default of appearance of both the plaintiff and defendant. The defendant in this case, therefore, contended, that as the case had eventually been dismissed, the decision of the Collector that the farming lease was inoperative was no bar to the same question being tried again. The court of first instance decreed the plaintiff's suit but the lower appellate court dismissed the suit. On the case coming up in second appeal, the decree of the court of first instance was restored by

GRIFFIN, J.—This was a suit for arrears of rent. The Assistant Collector (1st class) held on the strength of a decision of the Collector in a former suit that the question of defendant's liability to rent was *res judicata*. The District Judge on appeal was of the contrary opinion and holding on the merits that defendant was not the tenant of the plaintiff, dismissed the suit.

The plaintiff appeals on the ground that the lower appellate court was wrong in holding that the question of defendant's liability to pay rent was not *res judicata*.

It appears that in execution of a decree held by the defendant against the plaintiff, the Collector under orders of the Commissioner gave in 1901, a lease of the holding now in suit for a period of 15 years to the defendants the yearly rent to be set off against the decretal amount.

Under the circumstances explained in the judgment of the court below, the Collector subsequently passed an erroneous order cancelling the lease. There upon, the plaintiff instituted in the court of an Assistant Collector 2nd class a suit for recovery of rent from defendant. The Assistant Collector dismissed the suit upholding the defence set up that the defendant was in possession under his lease from the Collector not as plaintiff's tenant. The Collector, on appeal, held the lease in defendant's favour to be no longer operative and setting aside the order of dismissal, remanded the case for trial on its merits. Neither party appearing before the court of first instance, the suit was dismissed for default.

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The defendant however appealed to the District Judge against the Collector's order remanding the case. The District Judge while holding the Collector's order to be wrong, dismissed the appeal on the ground that he had no jurisdiction to hear it.

It is the decision of the Collector which according to plaintiff's contention operates as *res judicata* even if it should be an erroneous decision. The view taken by the learned District Judge is that as the dismissal of a suit under the provisions of section 99 or section 157 of Civil Procedure Code, leaves it open to the plaintiff to apply to have the suit restored to the file or to bring a fresh suit, the second alternative shows that the whole controversy is once more open. Further any decision come to in the former abortive suit does not bar the raising of the question so decided again. I am unable to accept this view. This question of defendant's liability to pay rent to plaintiff, was heard and finally decided by the Collector in the former suit. The Assistant Collector, who heard the first suit, had also jurisdiction to hear the present suit. The parties in both suits were the same. The vital issue in the former suit as to defendant's liability to pay rent to plaintiff was decided adversely to defendant. That finding became final. It is true that the first suit was eventually dismissed but it was dismissed for default only. I am unable to hold that under these circumstances either party is at liberty to regard the finding on a material issue come to in the first case as null and void. In my opinion the appeal must prevail. The case is a hard one for defendant. Appeal allowed decree of appellate court set aside and that of the court of first instance restored. I make no order as to costs.

Defendant appealed.

*Mohammad Ishaq*, for the appellant, contended that as the previous suit had on remand been dismissed for default and there was no final decision of the case, the defendant was not precluded from contending in a subsequent suit that the farming lease was operative. He cited,

*Rughoonath Singh v. Ram Coomar Mindal* [1870] 14 W. R. 81.

*Braj Narain Gurtu* (for *Iswar Saran*) for the respondent, contended that the case in 14 W. R. 81 was clearly distinguishable from the present case as it did not appear that in remanding that case the appellate court had decided any material issue raised. The decision of the Collector given on a material issue in the previous suit had become final. The issue decided by him could not again be decided by the first court on remand if the parties had appeared and presented the case. The parties that made default could not be placed on a higher footing. It was further contended that findings on the material issues, though not embodied in the final decree, did operate as *res judicata*.

*Niamut Khan v. Phadu Buldia*, [1880] I. L. R., 6 Cal., 319 (F. B.)

*Krishna Behari v. Bunwari Lal*, [1875] I. L. R., 1 Cal., 144 (P. C.)

*Jamaitunnissa v. Lutfunnisa*, [1885] I. L. R., 7 All., 606.

*Mohammad Ishaq*, was heard in reply.

The judgment of the court was delivered by

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*Stanley, C. J.*

STANLEY, C. J. We think that the decision arrived at by our learned brother is correct. The suit was one for recovery of arrears of rent and the main plea on which the defendant relied was that he was not the tenant of the plaintiff at all but held the property under a lease from the Collector, a lease executed under the provisions of section 174 of the Rent Act of 1881. It appears that in a previous suit between the same parties for rent the same defence was set up by the defendant. In that suit the Collector held on appeal that the lease which was relied upon was inoperative and setting aside the order of the first court remanded the case for trial on the merits. The defendant appealed to the District Judge but the District Judge holding that he had no jurisdiction to hear the appeal dismissed it. No further steps were taken by the defendant. The result of this is that the decision of the Collector that the lease upon which the defendant relied was inoperative, became final and binding. In the present litigation the first court held that this order of the Collector operated as *res judicata* and precluded the defendant from setting up the plea based upon the inoperative lease. Upon appeal, however, this decision was reversed but the learned Judge of this Court on appeal to him restored the decree of the first court holding that the question between the parties was *res judicata*. We think that he was perfectly right in coming to this decision. Although the finding of the Collector that the lease relied upon was inoperative, was not embodied in the decree which was passed, it was notwithstanding a finding which stands unreversed, that the lease was inoperative. That finding was in fact the basis of the order remanding the suit. Several cases have been relied upon by *Mr. Braj Narain Gurtu*, the learned Vakil for the respondents, which fully support his contention. We may point out that the decision at which we have arrived is in no respect inconsistent with that in the case of *Shib Charan Lal v. Raghunath* <sup>(1)</sup>. In that case it was held that

(1) [1895] I. L. R., 17 All., 174.

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a finding in a judgment which was not embodied in the decree and was not essential to the making of the decree as framed could not operate as *res judicata*. In this case the finding was essential to the making of the order of remand and therefore does operate as *res judicata*. We dismiss the appeal with costs including fees in this court on the higher scale.

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December 7, 12.

STANLEY, C. J.  
BURKITT, J.

BAHAL SINGH

versus

MUBARAK-UN-NISSA\*

*Pre-emption—Wajib-ul-arz—construction—Shurkayan-i-shikmi—meaning of.*

Where the wajib-ul-arz of a village gave a right of pre-emption first to *shurkayan-i-shikmi*, then to *shurkayan-ek-jaddi* and lastly to *khewatdaran* held that *shurkayan-i-shikmi* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal. *Jeymal v. Kesree*, [1866], Agra Full Bench Rulings 171 referred to. *Abdul Shakur v. Mendai*, [1901] I. L. R., 23 All., 260 distinguished.

SECOND APPEAL against the decree of L. G. Evans Esq., District Judge of Saharanpur reversing a decree of Babu Madho Das, Subordinate Judge.

SUIT for pre-emption of property sold on 14th September 1903 based upon wajib-ul-arz which gave a right of pre-emption first to *shurkayan-i-shikmi* then to *shurkayan ek jaddi* and then to *khewatdaran* mahal. The plaintiffs claimed preference over the vendees on two grounds:—

1. That they were sharers in the 15 Biswa mahal but that one of the vendees Amir-un-nissa was not and as the other vendee Mubarak-un-nissa had joined Amir-un-nissa, a stranger, she also lost her right, and

2. That the plaintiffs were *sharik patti* and therefore *sharik shikmi* of some of the property sold.

The defence was that the plaintiffs had no preference over the defendants; that one of the vendees Mubarak-un-nissa was a sharer in the Mahal whereas the other Amir-un-nissa was not a stranger. She was a co-sharer though not recorded.

The Subordinate Judge decreed the suit but the District Judge reversed the decree finding that

\* S. A. 1077 of 1905.

(1) the plaintiffs were co-sharers in the same *patti* but not in the same *khata* and

(2) that Amir-un-nissa was a co-sharer and therefore came within the *wajib-ul-arz* though not recorded at the time the suit was brought.

Plaintiffs appealed.

*Sir Walter Colvin* (with *M. L. Agarwala*, *Tej Bahadur Sapru* and *Parbati Charan*, for the appellant.

The word *shikmi* referred to nearness in space and *shurkayan-i-shikmi* meant persons grouped together in one sub-division of the mahal. As plaintiffs were sharers in the same *patti* with the vendor they had a preference over the vendee co-sharer in the mahal.

*Jey Mal v. Kesree*, [1866] *Agra F. B. Rulings*, 171.

*Abdul Shakur v. Mendai*, [1901] *I. L. R.*, 23 *All.*, 260.

*Motilal Nehru* (with *R. Malcomson* and *Mohammad Ishaq*), for the respondents.

*Shurkayan-i-shikmi* literally translated means sharers who have come out of the same *shikam i. e.*, uterine brothers. But as the word brothers is very loosely used I submit that *shurkayan-i-shikmi* is used for sharers who are relations. I do not say that the word can never admit of a second interpretation. The words may mean either sharers who are near in blood relationship or sharers who are near in space. They should be interpreted with reference to the context. If the contention of the other side is correct the words will have no fixed meaning and the co-sharers in a smaller sub-division will have a preference over sharers in a larger sub-division and the latter, over those, in a still larger sub-division and so on. The last category of *khewatdars* would in that case be entirely unnecessary to mention, as it would be included in the first. Further, *khewatdars* who are no relations would have preference over those who are, in spite of the fact that the *wajib-ul-arz* recognises the preferential right of a blood relation over *khewatdar*.

*Sir Walter Colvin* was heard in reply.

The judgment of the Court was delivered by

STANLEY, C. J. The sole question for determination in this appeal turns upon the meaning to be assigned to the expression "*shikmi*" share-holders, used in the

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wajib-ul-arz of village Kandhla, in the Saharanpur jndge-ship. On the part of the appellants it is contended that the word "*shikmi*" denotes those who are more closely connected with the vendor in a *thok* and *patti* in which the property, the subject of the sale, is situate than proprietors in another *patti* of the same mahal who are not proprietors in such *thok* or *patti*. On the part of the respondents, the contention is that the expression *shikmi* share-holders denotes share-holders born of the same *shikam*, that is *uterine* brothers or blood relations. The property in dispute formed part of *khewats* Nos: 22 and 33, portion of a mahal of 15 biswas. The *mahal* is divided into seven *pattis* and the land in dispute is situate in *patti* Khail, *thok* Bhuria. It is admitted that the plaintiffs appellants are co-sharers in *patti* Khail while the defendant Musammam Mubarak-un-nissa is a co-sharer in the mahal but not in *patti* Khail. In the *wajib-ul-arz* of the village, the persons in whose favour a right of pre-emption is given are classified under three heads:—

- (1) *Shikmi* share-holders (*Shurkayan-i-shikmi*).
- (2) Share-holders descended from a common ancestor (*Shurkayan-i-jaddi*), and
- (3) *Khewatdars* in the mahal (*Khewatdaran-i-mahal*).

The learned Subordinate Judge held that the plaintiffs had a preferential right of pre-emption and gave them a decree, but on appeal the learned District Judge reversed this decree, holding that neither the plaintiffs nor the defendants answered the description of *Shikmi* share-holders but came under the third clause as other "*khewatdars*" in the mahal and that therefore the plaintiffs had no preferential right of pre-emption as against the defendants.

The word *Shikmi* in connection with co-sharers in land is rarely met with and is a vague and indefinite term. We have been referred to two cases only in which the expression *shikmi* share-holders is to be found and we know of no other. In the case of *Jeymal v. Kesree and others* <sup>(1)</sup>, the construction of a *wajib-ul-arz* in which the expression *shikmi* occurred was referred to a Full-Bench. In the referring order it is stated that the expression *shikmi* sharers was said to have acquired

(1) [1866] Agra Full Bench Rulings 171.

the local meaning of sharers who are blood relations when these words occur in administration papers in the Saharanpur district, and reference is made to a judgment of the Principal Sadr Amin in which is a statement to the effect that the pleaders on both sides admitted that the phrase *shikmi* sharers expresses no distinct meaning, but that its local meaning is "a sharer who is a blood relation to another sharer." The case was referred to the Full-Bench so that a definite rule of construction might be laid down. According to the head note, the Full Bench decided that the proper construction of the words "*Shikmi shurkayan*" was that they gave a preference to the sharers in the *thoks* over those who were merely sharers in the village. This head note is altogether inaccurate, for we find on reference to the judgment that the Full Bench declined to decide what the meaning of the expression was or whether it had a special local meaning. They decided the case upon a later passage in the *wajib-ul-arz* which gave to the shareholders of the same *thok* a preferential right of pre-emption over share-holders who were merely sharers in the village. This case therefore does not help the appellants.

The other case to which we were referred is that of *Abdul Shakur v. Mendai* (2). The *wajib-ul-arz* which was considered in that case conferred the right of pre-emption on seven classes of persons, each class having a preferential right over the class next following. The first two classes were composed of persons who were related to the vendor, the remaining classes consisted of persons who were co-sharers of the vendor. By reference to the record we find that in the first class came own brothers. In the second class near relations. And in the third "*hissadaran-i-shikmi*." In the fourth class came the lambardar of the *behri* or *patti* and in the fifth a co-sharer in the *patti* while the sixth and seventh classes were respectively composed of the lambardars and co-sharers in the village. Sir Arthur Strachey, C. J., and Banerji, J., held that the expression "*hissadaran shikmi*" did not necessarily apply to any idea of subordination but was rightly considered as applicable to persons who were co-sharers in the particular *khata* of the *patti* in which the land sold was situate. In that case it will be noticed that the

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first two classes exhausted the relations by blood and it was therefore necessary to attach a meaning to the words "*hissadaran shikmi*" other than that of blood relations. Now as our brother Banerji pointed out in his judgment in that case, the various clauses of a *wajib-ul-arz* are not recorded with as much precision as is desirable, and therefore the intention must be gathered in each case from the whole context and the surrounding circumstances. He referred to the derivation of the word "*shikmi*" and pointed out that its primary meaning was inclusion, but the question is, inclusion in what? If we look to the derivation of the word, we should be disposed to hold that it referred to blood relations, such as uterine brothers, that is the fruit of the womb and not to share-holders in *mahal* or a sub-division of a *mahal*.

The contention, that the framers of the *wajib-ul-arz* in this case had blood relationship in view, when this expression was used gathers some support from the fact that the second category of pre-emptors is composed of share-holders (*shurkayan*) descended from a common ancestor. Relationship by blood rather than propinquity or vicinage would seem to have been in view in determining the priorities of claimants for pre-emption. A sequence of classes according to which share-holders descended from a common ancestor would be interposed between share-holders in a sub-division of the *mahal* and share-holders in the *mahal*, would not be natural. In the third category the word *shurkayan* is not used to denote share-holders but a different word, namely, *khewatdars*. If the word *shikmi* implies connection with the vendor by reference to inclusion in property in which both are share-holders, it must have reference to a sub-division of the *mahal*, and not to the *mahal* itself, seeing that in the third category come co-sharers in the *mahal*. To what sub-division of the *mahal* then would it apply? Is it to co-sharers in the *patti* or in the *thok*, or in the *khata* or a sub-division of the *khata*, and is there a preferential right given to share-holders in each of these sub-divisions, and if so, in what order? If we accept the argument advanced on behalf of the appellants, we must define *shikmi* share-holders as limited to share-holders in the *thok*, or in the *patti*, or in the *khata* or in the sub-division of the *khata*. In other words we should be

considerably enlarging the category of pre-emptors. We do not think that this was intended. Regarding the whole context of the *wajib-ul-arz*, we think that the expression *shikmi shurkayan* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal.

For these reasons we think the learned District Judge rightly dismissed the plaintiff's suit. We dismiss the appeal with costs including fees in this court on the higher scale.

X

*Appeal dismissed.*

KAUSELLA AND ANOTHER

*versus*

RAM SARUP\*

*Appeal to His Majesty in Council—Order of remand under section 562, 596—Code of Civil Procedure (Act XIV of 1882), "Final Decree"—*

The High Court declined to grant leave to appeal to His Majesty in Council against an order of remand under section 562 of the Code of Civil Procedure in a case where a Subordinate Judge overruling a plea of limitation had dismissed a suit as barred by the rule of *res-judicata* and the High Court reversed that decree upon the ground that the suit was neither barred by limitation nor the rule of *res-judicata*. *Raja Tassaduk Rasul v. Farzand Husain*, 2 C. W. N., CCCI followed.

APPLICATION for leave to appeal to His Majesty in Council. The material facts appear from the judgment.

*J. N. Chaudri* (with him *Govind Prasad*), for the applicant.

*Sundar Lal* (with him *S. C. Banerji*), for the respondent.

The judgment of the Court was delivered by

STANLEY, C. J.—This is an application for leave to appeal to His Majesty in Council. The value of the suit in the court below and also in this Court exceeds Rs. 10,000. In the court of first instance two pleas in bar of the suit were set up, one a plea of the statute of limitation and the other a plea of *res-judicata*. The plea of limitation was over-ruled by the court of first instance but the suit was determined in favour of the defendants on the plea of *res-judicata* which the court found to be established.

\* P. C. A. No. 13 of 1907.

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An appeal was, then, preferred to the High Court, the only question before the Court being the question as to whether the plea of *res-judicata* had been properly accepted by the court below. On the hearing of the appeal, however, the learned Counsel who represented the respondent admitted that he could not support the decision of the court below on the question of *res-judicata*. In our judgment we find the following reference to this admission :—" The learned Counsel, who represented the respondents, frankly admitted at the hearing that he was unable to support the decree of the learned Judge on the ground taken by the latter as to the appellant being bound by the decree of January 25th 1893." In view of this abandonment of the plea of *res-judicata* nothing remained for this Court to do but to remand the case for trial of the issues which had been left undetermined. The learned Counsel for the respondents, however, in this Court claimed the right to support the decree of the court below on a ground not mentioned in the memorandum of appeal, namely, that when the suit was brought it was time barred. This we held it was open to him to do, but after hearing the arguments agreed in the view taken upon this question by the court below, namely that the suit was not barred by limitation and we accordingly remanded it for trial on the merits under section 562 of the Civil Procedure Code. Now it is stated that the case has been heard upon the merits and the issues have been determined unfavourable to the present applicants for leave to appeal to His Majesty in Council. They now ask for leave to appeal against the order of the Court, remanding the case under section 562 of the Code of Civil Procedure. We are of opinion that the application should not be granted. It was decided by a bench of this Court in the case of *Habib-un-nissa and others v. Munawar-un-nissa*<sup>(1)</sup> that an order under section 562 is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so if the order in question has the effect of deciding finally the cardinal point in the suit. We do not consider that our order of remand had the effect of determining a cardinal point in this suit, and leave ought not to be granted. We are supported in this view by a ruling of their Lordships of the

(1) [1903] 23 A. W. N. 159. (2) 2 C. W. W. N. ccc1.

Privy Council in *Raja Tassaduk Rasul Khan v. Farzand Husain* (2) in a proposed appeal to His Majesty in Council in which Raja Tassaduk Rasul Khan and another were the appellants and Farzand Husain and others were the respondents. It appears in that case that amongst other defences set up in the suit was the defence that this suit was barred by limitation under certain articles of the Limitation Act, as in this case. The learned District Judge of Fyzabad held that the suit was barred by limitation, but upon appeal to the Judicial Commissioner of Oudh, he held that the suit was not barred and remanded it for trial under the provisions of section 562 of the Code of Civil Procedure as was done also in this case. An application was then made to the Judicial Commissioner's Court for leave to appeal to His Majesty in Council, which was refused on the ground that the decree sought to be appealed from was not a final decree within the meaning of section 595. An application was then made for special leave to appeal but their Lordships of the Privy Council rejected the application. We think that leave to appeal should not in this case be granted. We reject the application with costs.

*Application rejected.*

### KASHI NATH

*versus*

### KING EMPEROR.\*

*Gambling Act—(III) of 1867—Search warrant issued to Police Officer by Magistrate—Such Police Officer endorsing it for execution to another Police Officer—Legality of execution of search by the Police Officer.*

Search warrants issued under Act No. III of 1867 (Gambling Act) are governed by those provisions of the Code of Criminal Procedure which provide for the issue of the warrants in general. Consequently, a search warrant may be endorsed by a Police Officer to whom it was originally directed to another who is not of a rank below that authorized under the Act to enter and search.

CRIMINAL REVISION against the order of Rai Bahadur Lala Baij Nath, Sessions Judge of Benares, varying the order of F. C. Chamier Esq., Magistrate, first class.

The material facts appear from the judgment.

*C. Dillon*, for the applicants.

\* Cr. Revision No. 622 of 1907.

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*W. K. Porter* (Assistant Government Advocate), for the crown.

The following judgment was delivered by

KNOX, J.—Kashi Nath and Raj Nath have been convicted of an offence under section 3 of Act No. III of 1867. They appealed from their conviction to the Court of Sessions at Benares. The conviction was upheld, but the sentence modified. The case has come before me in revision and I am asked to interfere with the conviction and sentence on the ground that owing to the *Kotwal* of Benares having endorsed a search warrant addressed to him under section 5 of Act No. III of 1867 to another Police Officer, the warrant so executed was illegal and the entry and search of the house in question was not such as to give rise to the presumption contained in section 6 of Act No. III of 1867.

It is further contended that the record does not show that the Magistrate, who granted the warrant, acted on credible information and if so he had no jurisdiction to grant the warrant. From this it would follow that the police officer acted illegally in entering and searching the house, with the further result, again that the presumption authorised by section 6 could not be entertained by the court. The warrant on the face of it contains an entry to the effect that the Magistrate acted on credible information, but it is contended that it is a printed form and that the accused has a right to demand that there should be on the record some material, which the appellate or revisional court can see, and from which it can judge whether the information was in fact credible. In the present case I need not enter into this point, for, I find, looking into the judgment of the appellate court, that the Magistrate, who issued the warrant, had a good deal of information from which he was authorised to issue the warrant that he did issue. Reference was made to several cases, namely, *Queen Empress v. Ram Bharose*, (1); *Queen Empress v. Chiranji* (2) and *Queen Empress v. Yusuf Husain*, (3). All these deal with what should be deemed credible information. As is pointed out in

(1) [1890] W. N. 226.

(2) [1891] W. N. 111.

(3) [1889] W. N. 162.

*King Emperor v. Abdul Samad*, (4) the meaning of the word credible information must in each case depend on its own circumstances. In the present case numerous circumstances have been pointed out by the Sessions Judge and further a large body of some thirty men, who were found in the house in question, consisting as that body did, of *brahmins*, *ahirs*, *sonars*, *banias*, *bharbhunjas*, common cultivators, shop-keepers, *munihars* and *kayasthas*, points to the conclusion that they met for the purpose of gambling. I attach great significance to this fact also that a box was found under the feet of Kashi Nath and Raj Nath. So far as my experience goes it is a fair inference that the money which that box contained, was for the benefit of the owners of the house, nor do I think that there is much force in the other contention. The learned Counsel who appears for the accused argued that the warrant was one that was issued, not under the Code of Criminal Procedure, but under Act No. III of 1867, and so it could not have been passed on by the officer to whom it was granted to another officer. I, however, find nothing in Act No. III of 1867, which would prevent the passing on of the warrant to another officer provided always that such latter officer was not of a rank below the rank authorised under the act to enter and search. It is not contended that the officer who executed the warrant was below the rank of the officer, who could execute a warrant under Act No. III of 1867. That Act empowers a magistrate to authorise any police officer not below the rank of a sub-inspector of police to enter and search a house. There is no provision requiring the magistrate to mark by name the particular officer, who is to execute the warrant. The view I take is that warrants issued under Act No. III of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and execution of warrants in general. In that case there arises no such difficulty, as that raised in the present case, the Code does authorise a warrant being passed on to another officer for execution. I dismiss the application.

*Application dismissed.*

(4) [1906] I. L. R., 28 All., 210.

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BURKITT, J.

## HAIDAR HUSAIN AND OTHERS

*versus*

## ABDUL AHAD AND OTHERS\*

*Code of Civil Procedure (Act XIV of 1882), section 362—appeal—death of appellant—all heirs not brought upon the record—duty of the heirs—abatement.*

A Mahomedan appellant having died his sons applied to be brought upon the record in their place. The respondents applied that his daughters may also be added as parties. This application was not granted. *Held* that it was the duty of the sons to bring their sisters upon the record along with themselves and they not having done so the appeal abated. *Ghamandi Lal v. Amir Begam*, I. L. R., 16 All., 611 followed.

SECOND APPEAL against the decree of Babu Sheo Prasad, Additional Subordinate Judge of Ghazipur, reversing a decree of Babu Man Mohan Sanyal, Munsif of Rasra.

SUIT for possession of certain plot of land.

The material facts appear from the judgment.

The court of first instance dismissed the suit but the lower appellate court reversed the decree.

Defendants appealed.

*M. L. Agarwala*, for the appellants.

*Motilal Nehru* (with him *Abdul Raoof*), for the respondents.

The judgment of the Court was delivered by

Stanley, C. J.

STANLEY, C. J.—The suit out of which this second appeal has arisen was instituted by one Mohammad Nabi. His suit was dismissed in the first court whereupon an appeal was filed by him during the pendency of which he died, leaving as his legal representatives his widow, two sons and two daughters. The two sons applied to the court to be brought upon the record as appellants and they were so brought. Thereupon the defendants asked the court to have the other representatives also brought upon the record. These representatives were served with notice of the application but took no notice of it and in view of their attitude the court did not feel justified in adding them, as appellants and declined to do so, directing that the hearing should proceed. It was obviously the duty of the two sons

\* S. A. No. 506 of 1906.

to apply to the court to have the other representatives brought on the record either as appellants or as respondents but they neglected to take any steps in this direction. The result is that in accordance with the ruling of this court in the case of *Ghanan li Lal v. Amir Begam* <sup>(1)</sup>, the appeal abated. We had occasion to consider this ruling in the recent case of *Jugul Kishore v. The Collector of Bijour*, (Second appeal No. 52 of 1905) and we approved of and followed it. It is too late now to ask us to pass an order upon the application of the defendants to bring the other representatives on the record which was rejected by the court below. The result is that the appeal to the lower appellate court abated and the decree obtained from that court must be set aside, and the decree of the court of first instance restored with costs in all courts.

*Appeal decreed.*

(1) [1894] I. L. R., 16 All., 211.

### PRIVY COUNCIL.

MA WUN DI AND ANOTHER

*versus*

MA KIN AND OTHERS.

*Marriage—presumption—arising from co-habitation—habit and repute.*

Before applying the general presumption of marriage arising from co-habitation with habit and repute it is necessary to make sure that the conditions necessary for its existence are present. Held that where a Burmese woman lived with a Burman, who had a wife and mistresses, and cohabited with him, there was no presumption that she was his wife.

Before repute can arise there must be some body of neighbours, many or few or some sort of public, large or small. The habit and repute, which alone is effective is habit and repute of that particular status which in the country in question is lawful marriage.

APPEAL from a decision of the Chief Court of Lower Burma.

The material facts appear from the judgment.

*Roskill, K. C., (J. W. McCarthy with him) for the appellants. Cowell, for the respondents.*

The judgment of their Lordships was delivered by

LORD ROBERTSON.—The question in this appeal is one of fact; and it has been decided against the appellants by two courts. The case, however, deserves attention, for there has been

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a strong appeal made to the general presumption of marriage arising from co-habitation with habit and repute.

It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few or some sort of public, large or small, before repute can arise. Again the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage.

The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open co-habitation without marriage is so uncommon that the fact of co-habitation in many classes of society of itself sets up, as a matter of fact a repute of marriage. But in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.

In the present case the broad facts are these : a domiciled Burman, Maung Gale, has his house and wife at Moulmein in Burma ; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Wun Di, who, for shortness, will be called the appellant. The appellant has maintained that while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The opposite contention is that while the appellant was older than the other women (who all lived in the same house) and had, for that reason and also for reasons of choice, a stronger hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion ; but her Counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours

or the public ; and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage than the use of the word "wife" by some of the witnesses ; and the most cursory, as well as the most careful examination of the evidence shows that it is applied to persons whose status is not matrimonial.

Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are apposite and weighty :—

"It is not forbidden to a Burma Buddhist to have two wives at the same time ; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectful. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife ; and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife."

There remains to be noticed one point which the appellants' Counsel treated as part of his case of habit and repute and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as "a British subject, proposing to "travel in Siam." In 1891 he renewed it ; and as part of the docket of renewal, which is signed by the Acting Vice-Consul, are the words : "Names of female relations living with Maung Gale : (1) Ma Wun Di, wife ; (2) I Mun, sister-in-law." The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all ; the Vice-Consul is not proved to have had any personal knowledge

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*Lord Robertson.*

of these people at all and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has, in the present case, is entirely taken away by the addition of the sister-in-law who on no theory was a naturalised British subject. The truth probably is that the entry is put in merely as an item of information identifying Maung Gale, in addition to those given in the body of the certificate.

The appellant's Counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage; and the point urged by Mr. Roskill, having been submitted in the conduct of the case to neither Court, their Lordships are unable to entertain this question.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellants. *Bramall and White.*

Solicitors for the respondents. *Gregory, Day & Co.*

## PRIVY COUNCIL.

SURAJ MANI AND OTHERS

*versus*

RABI NATH OJHA AND ANOTHER.

*Hindu Law—widow—gift in favour of—Malik—meaning of.*

Where the words *Malik wa khud ikhtiyar*, are used in a deed of gift in favour of a Hindu widow, they import an idea of full proprietary rights, and unless there is something in the context to qualify her rights she takes an absolute interest in the property. *Kollany Koer v. Luchmee Pershad*, 24 W. R., 305, *Lalit Mohan v. Chukkon Lal* L. R., 24 I. A., 76 approved. *Padam Lal v. Tek Singh*, I. L. R., 29 All., 217 referred to.

APPEAL from a decision of the High Court of Judicature for the North-West Provinces at Allahabad.

Suit for declaration.

The Courts below decreed the suit.

Defendants appealed.

The material facts appear from the judgment.

*L. DeGruyther*, for the appellants.

*Ross*, for the respondents.

The judgment of their Lordships was delivered by

LORD COLLINS.—This is an appeal from the High Court at Allahabad affirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the first appellant, Musammat Surajmani, acquired a right to alienate the property now in suit, under a deed of gift or testamentary instrument of her late husband, Ishwar Nath Ojha. The material part of the document is as follows :—

“ I, now of my own free will and accord while in a sound state of mind and in enjoyment of my senses, make a gift of the entire village Dwarkapur Nankar in tappa Asnari and half of the village Telpurwa in tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of Mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and

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half of mauza Jamla Jot, *i.e.*, an eight anna share in it, in tappa Barikpur to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration on the condition that during my life-time I shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original "malik wa khud ikhtiyar." The appellants contend that these words are amply sufficient to confer an alienable estate. The respondents on the other hand contended, and the courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the plaintiffs (respondents) as heirs of Ishwar Nath and of Surajmani for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this appeal is brought. The effect of the word "malik" in testamentary gifts has been often discussed in cases decided in the different courts in India where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it and expressed the opinion that the words in question passed the absolute estate, *Padam Lal v. Tek Singh*. <sup>(1)</sup>

In the present case, the Subordinate Judge seemed to recognize that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

(1) [1907] I. L. R., 29 All., 217 at 221—2.

In *Kollany Kooer v. Luchmee Pershad* <sup>(2)</sup> decided in 1875, Mitter J., in dealing with the case of a will where the donees were the widow and daughter of the testator, and the word "malik" was used, thus expresses himself :—

"As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (maliks) proprietors and his entire estate shall devolve upon them. In *Jotendro Mohun Tagore v. Ganendro Mohun Tagore* (18 W.R. p. 359) the Judicial Committee say (at p. 365): 'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo Law (as under the present state of the law it does by will in England) an estate of inheritance.' In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani Kooer and Uma Kooer. Therefore adopting the rule of construction above quoted, we must hold that the gift in question was an absolute gift unless it can be shown that by the Hindoo Law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widows' estate' under the law of inheritance. I am not aware of any such provision in the Hindoo Law nor have we been referred to any authority in support of it."

The question as to the effect of the word "malik" came before this Board in 1897 in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy* <sup>(3)</sup>. The donee in that case was a man but the principles of interpretation laid down were of general application. Referring to the donee the testator said :—

"If no children are born to me . . . or if at the time of my death they are not alive, then . . . my nephew . . . becoming on my death my sthalabhishikta, and becoming owner 'malik' of all my estates and properties &c., shall remaining my sthalabhishikta obtaining the management of the Iswarshebas . . . enjoy with son, grandson, and so on in succession the proceeds of my estate . . . The minor, on reaching majority, shall exercise ownership (malikatwa) over all the properties."

In delivering the judgment Lord Davey at p. 88 says :

"It was not disputed . . . that the son of the testator if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate . . . Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The

(2) [1875] Weekly Rep., 395 at 396.

(3) [1897] L. R., 24 Ind. App. 76.

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words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson, and so on in succession' which latter words are frequently used in Hindoo wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word "malik" as was taken in the Calcutta case *Kollany Kooer v. Luchmee Parshad* (2) above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents but the fact that the donee is a woman and a widow, which was expressly decided in the last-mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word malik, the context does seem to strengthen the presumption that the intention was that "malik" should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned Counsel for the respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and, if this be admitted, the respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned Judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the appeal be allowed and the decrees of both the courts below discharged and instead thereof the suit dismissed with costs in both courts. The respondents will pay to the appellants the costs of this appeal.

*Appeal decreed.*

Solicitors for the appellants: *Pyke, Parrot & Co.*

Solicitors for the respondent: *Osborn, Jenkyn & Son.*

## HIGH COURT.

NIRANJAN

*versus*

GAJADHAR\*

*Agra Tenancy Act (II of 1901) Section 177—which party a tenant—  
question of proprietary title.*

The question, which of the two parties is a tenant of a specified land, is not a question of proprietary title. *Chhittar Singh v. Rup Singh*, [1906] A. W. N., 247 overruled.

REFERENCE by the District Judge of Jaunpur under section 195 of the Tenancy Act (II of 1901).

The facts are as follows :—

Niranjan Ahir brought a suit in the revenue court for ejectment of Gajadhar from certain plots of land on the ground that the plaintiff was a tenant at fixed rate and the defendant was his sub-tenant. The defence was that he was not a sub-tenant of Niranjan, but that he was the tenant in chief and used to pay rent directly to the zamindar.

The Assistant Collector dismissed the suit. The plaintiff appealed to the District Judge, who entertained a doubt whether an appeal lay to him and referred the matter to the High Court.

The appellant was not represented.

*Parbati Charan Chatterji* for the respondent.

The judgment of the Court was delivered by

KNOX, J. On the facts stated by the learned District Judge of Jaunpur we hold that no question of proprietary title was in issue in the Court of first instance and that no such question is a matter in issue in this appeal. The learned District Judge is right therefore in his view that he had no jurisdiction to entertain the appeal. The opposite view may perhaps derive some support from the observation made towards the conclusion of the judgment in *Chhittar Singh v. Rup Singh* (1).

Misc. No. 268 of 1907.

1 [1906] A. W. N., 247.

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KNOX, J.  
AIKMAN, J.

Knox, J.



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But with all deference to the learned Judge who decided the case, we are unable to agree with him in holding that when there is a question whether one party or the other is the cultivator of specified land, a question of proprietary title arises. This is our answer to the reference.

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January 2.

KNOX, J.,  
AIKMAN, J.

## AJUDHIA AND OTHERS

versus

## KUNJAL AND OTHERS\*

*Limitation Act (XV of 1877), Sch. II, article 75—instalment bond—creditor having an option of suing for the whole on first default—not exercising that option—limitation.*

Under the terms of an instalment bond the creditor had an option to recover the whole amount but did not avail himself of it. On the contrary he brought this suit for recovery of an instalment more than three years after the date of the first default, *held* that the suit was not barred by limitation. When a bond is not so worded as to compel a creditor to sue for the whole amount at once on the first default, he could not be compelled to sue for the whole. *Shankar Prasad v. Jalpa Prasad*, I. L. R., 16 All., 371 applied.

SECOND APPEAL against the decree of Babu Bipin Bihari Mukerji, Judge of the Court of Small Causes at Cawnpore, exercising the powers of a Subordinate Judge, modifying a decree of Maulvi Muhammad Azim-ud-din, Munsif of Fatehpur.

Suit for recovery of money.

The facts are as follows:—On the 3rd of August 1891, one Debia, father of defendants Nos. 1 to 4, executed an instalment bond for Rs. 500 in favour of Kashi Prasad, ancestor of the defendants Nos. 5 and 6, agreeing to repay the amount by annual instalments of Rs. 50 each in ten years from Jeth 1949 to Jeth 1958. On the 1st May 1905, the defendants Nos. 5 and 6 sold to the plaintiff the last four instalments then due on the bond. The plaintiff admitted that his claim to the first of these four instalments was barred by limitation and he therefore sued to recover the last

\* S. A. 489 of 1906.

three instalments only together with interest from the defendants Nos. 1 to 4 or from his vendors (the defendants 5 and 6). The first court dismissed the claim as against both sets of defendants. The plaintiff appealed and the lower appellate court decreed the suit for the three instalments, with interest against defendants Nos. 1 and 4, sons of the original debtor.

The defendants appealed.

*Muhammad Ishaq Khan*, for the appellants.

*Muhammad Ishaq*, for the respondent.

The judgment of the Court was delivered by

KNOX, J.—On the 3rd of August 1891, the father of the first four defendants executed a bond payable by instalments in favour of one Kashi Prasad, father of the remaining defendants. The bond contained a provision that in default of the payment of any one instalment, it would be within the power of the creditor (*Mahajan mazkur ko ikhtyar hoga*) to sue for the whole amount due under the bond, without waiting for the period provided for the payment of other instalments. The present suit is for the recovery of three instalments due under the bond. The Munsif held that the suit was barred by the provisions of article 75 of schedule 2 of the Indian Limitation Act and dismissed the suit. The suit, we may here observe, was not for the enforcement of the option given by the bond, whereby the creditor could claim the whole amount unpaid. The plaintiff, appealed and the learned Subordinate Judge in a very able judgment held that the claim was not barred. The defendants come here in second appeal and again contend that the plaintiff's cause of action arose upon the default, made in payment of the first instalment, and that the suit is therefore barred by limitation. There might have been some force in this contention, if the suit had been to enforce the penalty and to recover the whole amount, left unpaid by the bond. But the suit was only for the instalments, unpaid at the time of the suit. In support of his argument the learned Counsel referred us to two decisions of the Calcutta High Court, namely, *Jadab Chandra Bakhshi v. Bhairab Chandra Chukerbutty* (1), and the case upon which

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(1) [1904] I. L. R., 31 cal., 297.

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that decision is based, *viz. Hurri Pershad Chaudhry v. Nasib Singh* (<sup>2</sup>). The latter case has been expressly dissented from in Letters Patent Appeal No. 81 of 1893, decided on the 10th of July 1894, in which the learned Judges *held* that the true rule of construction in cases of decrees for payment by instalments is to be found, in the decision of this court in *Shankar Prasad v. Jalpa Prasad* (<sup>3</sup>). These rulings are distinctly against the appellants here. We may also refer to what was said in *Maharaja of Benares v. Nand Ram* (<sup>4</sup>). We agree with the remarks of the learned Judges who *held* in the last mentioned case that it would be very unfortunate if the view contended for by the appellant is sustained, as it would be to punish the creditor for forbearance shown to his debtor and compel him to press his demands at the earliest opportunity. It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately, if any default occurred. The bond with which we have to deal is not so worded. It merely gives the creditor an option. Following the law as laid down by this court, and with all deference to the learned Judges of the Calcutta High Court, who have taken the opposite view, we are unable to agree with them. This disposes of the first ground of appeal. The only other ground was not argued. We dismiss the appeal with costs including in this court fees on the higher scale.

*Appeal dismissed.*

(2) [1894] I. L. R., 21 Cal., 542. (3) [1894] I. L. R., 16 All., 371.

(4) [1907] A. W. N., P. 139.

CRIMINAL.

—  
 1907.  
 —

December, 18.

KNOX, J.

MUHAMMAD MUTAQI AND OTHERS

*versus*

KING EMPEROR\*

*Code of Criminal Procedure (Act V of 1898), section 203—Dismissal of complaint—further enquiry ordered without notice to accused—notice unnecessary.*

The Magistrate before whom a complaint was laid after issuing notice to the accused dismissed it under section 203 of the Code of Criminal Procedure. The District Magistrate, however, ordered further enquiry but issued no notice to the accused to show cause. The case was made over to another Magistrate for further enquiry.

Cr. R. No. 689 of 1907.

*Held*, that no notice was necessary, the proceedings having reached no further stage than they did. *Emperor v. Tabarak Zaman*, [1907] A. W. N., 286 referred to.

It is impossible to lay down a general rule that in every case the Magistrate exercises a wrong discretion, if he orders further enquiry without notice being sent to the accused. The safer and more convenient course is to send such notice.

APPLICATION to revise an order of T. K. Johnston Esq., District Magistrate of Moradabad, reversing an order of Kazi Mohammad Aziz-ud-din Ahmad, Magistrate 1st class.

The facts appear from the judgment.

*C. Dillon* (with him *Mohammad Raoof*), for the petitioner.

The Assistant Government Advocate (*H. K. Porter*), for the crown,

*B. E. O'Connor*, for the complainant.

The following judgment was delivered by

KNOX, J.—One Muhammad Husain instituted a complaint, against Musammat Akbari Begam and others, to the effect that they had committed offences under sections 417, 427 and 477 of the Indian Penal Code. The Magistrate before whom the complaint was instituted, took action under section 202 of the Code of Criminal Procedure and eventually dismissed the complaint, acting under section 203 of the same Code. It appears from the order sheet that he sent a notice to the persons complained against telling them that this complaint had been instituted against them. The District Magistrate appears to have heard the case and to have come to the conclusion that it was one in which there should be further inquiry, without calling upon the accused to show cause why further inquiry should not be made. He made over the case to another Magistrate to make such further inquiry. Exception is taken to this order that it should not have been issued without issuing notice to the persons complained against to show cause why further inquiry should not be made. The learned Counsel, who appears for the petitioners, argues that the proceedings in the court of the Magistrate, who first inquired into the case, had gone much further than was contemplated by sections 202 and 203 of the Code. The persons complained against had come into court and

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the order partook rather of the nature of an order of discharge than merely an order of the dismissal of a complaint. He also laid stress upon the necessity of a notice being issued to an accused person before any order is made to his prejudice. He referred me to the case of *Brij Kishore Ghosh v. Gobal Rai* (1), in which it is laid down that no order should be passed against an accused without his getting an opportunity of being heard. I am, by no means, prepared to go so far as this, specially when the proceedings have reached no further stage than they did in the present case. I would refer here to the remarks which I have made in *Emperor v. Tabarak Zaman* (2). It would not be difficult to conceive a case where a complaint of some serious offence, as for instance of a murder, had been instituted in the Magistrate's Court and dismissed on the ground that the complainant could not produce evidence which would justify a warrant of arrest being issued and that upon the discovery of further evidence, the District Magistrate might find it necessary in the interest of public justice to order the complaint to be enquired into afresh. In such case the sending of a notice to the person complained of might result in his evading justice altogether. It is, therefore, impossible to lay down a general rule that in every case of this nature the Magistrate exercises a wrong discretion, if he orders further inquiry without notice being first sent to him. The safer and more convenient course is, undoubtedly, when a notice can with safety to the public interests be given to a person complained against, to issue such notice and to hear any cause that may be shown. That course might have been followed in this case. I understand, however, that matters have now reached a further stage, that the inquiry has practically been completed and I do not think any advantage would be secured if I send the case back to the learned District Magistrate to follow out this rule. It would only lead to further inconvenience so far as the persons complained against are concerned. I reject the application.

*Application rejected.*

(1) [1907] 11 C. W. N., 316.

(2) [1907] A. W. N., 288.

BHURA.

*versus*

SHAHAB-UD-DIN. \*

*Agra Tenancy Act (II of 1901), section 22 (1)—male lineal descendants—  
Mahommedan Law of succession not applicable.*

The new Tenancy Act has completely altered the rule of devolution in the case of an occupancy tenancy upon the death of the tenant. The tenancy no longer devolves "as if it were land" (as in Act xii of 1881) but on the lineal male descendants of the last tenant. The Mahommedan law of succession does not apply.

Hence, where a Mahommedan occupancy tenant died leaving a son and grandson, *held* that they would share the occupancy holding equally.

SECOND APPEAL from a decree of L. G. Evans Esq., District Judge of Saharanpur affirming a decree of S. P. O'Donnell Esq., Subordinate Judge of Dehra Dun.

Suit for ejectment.

The facts of the case were as follows :—

One Kallu an occupancy tenant of certain holdings died leaving him surviving a son, the plaintiff, and a grandson, son of a predeceased son of Khuda Bux. The plaintiff instituted proceedings in the revenue court and obtained possession of a portion of the occupancy holding. Then he brought the present suit in the civil court as the land in question was occupied by a house. The courts below found the land in dispute was appurtenant to the occupancy holding and dismissed the suit on the ground that section 22 of the Tenancy Act applied and both the son and grandson shared equally.

Plaintiff appealed.

*Mohan Lal Nehru* for the appellant submitted that this case was not governed by the Tenancy Act as the suit was for possession of land occupied by a house.

Section 22 did not over-ride the personal laws of either Hindus or Mahomedans. It only contemplated a case of male descendants having preference over other heirs. The policy of the law was to prevent division of occupancy holdings. *cf.* section 32. If "male lineal descendants" meant that a son and a grandson among Mahomedans would take equally then

\*S. A. 408 of 1907.

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*Burkitt, J.*

the result would be that in a case where a person died leaving two sons and three grandsons, sons of the same two sons, the holdings would be divided into five shares three of which would go to one branch of the family.

*Shafi-us-samman* (for *Mohammad Ishaq*) was heard in reply.

The judgment of the Court was delivered by

BURKITT, J.—In our opinion the decision of the learned District Judge (affirming the decision of the Subordinate Judge) is correct. The question is as to the interpretation to be put on the 1st clause of section 22 of the N.-W. P. Tenancy Act No. II of 1901. That clause in the matter of the succession (inter alia) to an occupancy tenant provides that on the death of the tenant his interest in the holding shall devolve on his male lineal descendants in the male line of descent. The appellant and the respondent to this appeal are both male lineal descendants of the last tenant in the male line of descent. The appellant is his son while the respondent is his grandson. As the respondent's father predeceased his father the last tenant, the respondent would be excluded under the Rent Act of 1882, section 9 which by the words "as if it were land" made the personal law of the party applicable to the descent of an occupancy holding. The appellant therefore desires us to read into section 22 of the Act now in force such words as would make the tenure descend as if it were land, thus excluding the respondent. As a reason for his contention his learned Vakil pointed out that some unexpected results might follow from a literal interpretation of section 22. For instance in the case of the death of a tenant leaving several sons, grandsons, and even great-grandsons, he argues that under the words of section 22 the tenure might be held to devolve simultaneously on all.

As to that matter we do not consider it necessary to express any opinion now. There can be no doubt that the new Tenancy Act has completely altered the rule of devolution in the case of a tenancy such as that in question here. The tenancy no longer devolves "as if it were land" but on the lineal male descendants of the last tenant. The

legislature has chosen to alter the law and we can see no reason why we should not assume that the new provision was not deliberate and intentional. The parties here are Mahommedans whose personal law gives a share in the estate of a deceased Mahommedan to daughters, wives, sisters and other females, who are excluded by the words "male lineal descendants" in section 22 of the new Act. If we apply the Mahommedan law for the purpose of excluding the respondent, it is difficult to see why we should not apply it to include females whom the first clause of section 22 excludes when there are "lineal male descendants."

We dismiss this appeal with costs.

*Appeal dismissed.*

B. E. O'CONOR AND ANOTHER

*versus*

RAJ BAHADUR AND ANOTHER\*

*Pre-emption—Wajib-ul-arz—One mahal—Perfect partition—Custom—Contract.*

Mauza Barauli was sub-divided by perfect partition into three mahals; Mahal Ali Mazhar, Mahal Bhairon Pershad, Mahal Sheo Dial Ram. Before partition the *wajib-ul-arz* of the Mauza provided that a right of pre-emption existed in the following order: first to sharers descended from a common ancestor, then to co-sharers in the village, then to strangers. At the time of partition three *wajib-ul-arzes* were prepared for the three mahals. The *wajib-ul-arz* for the mahals Ali Mazhar and Bhairon Pershad, which mahals had a sole proprietor, reproduced the wording of the *wajib-ul-arz* of the undivided village, in a chapter, the heading of which referred to the rights of sharers in the mahal. In the third mahal, which had numerous sharers, the wording of the original *wajib-ul-arz* was modified, and it was provided that a right of pre-emption in case of a transfer by a *pattidar* would exist in the following order: first co-sharers descended from a common ancestor, then *pattidars*, then strangers. On sale of Mahal Ali Mazhar the proprietor of Mahal Bhairon Pershad sued for pre-emption, basing his claim on the *wajib-ul-arz*. *Held* that the preparation of new *wajib-ul-arzes* for the three mahals abrogated the old custom of pre-emption, and that the fact that the sole proprietors of Mahals Ali Mazhar and Bhairon Pershad had caused to be made an entry

\*S. A. 132 of 1904.

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in the *wajib-ul-arz* relating to the right of pre-emption in those mahals, did not give these proprietors any authority to control their own rights or the rights of their successors over the property. The *wajib-ul-arz* did not prove the existence of a custom of pre-emption in the mahals in question.

SECOND APPEAL against the decree of C. Rustomjee Esq., District Judge of Allahabad, confirming a decree of Khan Bahadur Mir Akbar Husain, Judge, Small Cause Court, exercising the powers of a Subordinate Judge.

Suit for pre-emption.

The village Barauli originally formed one mahal. It was divided into three separate mahals by perfect partition in 1885-6. Three new and separate *wajib-ul-arzes* were drawn up for these three mahals, *viz.*, that of (1) Lala Bhairon Prasad, (2) Saiyid Ali Mazhar and that of (3) Sheodial Ram. In the *wajib-ul-arz* of the mahal prepared at the time of settlement in 1870, the chapter, containing the condition about pre-emption, was headed *babat hukuk malkan deh* (relating to the rights of the proprietors of the village). It recited

"If any co-sharer wishes to transfer his share by sale or mortgage, he can do so first to the *shurkai ekjuddi* (co-sharers descended from the common ancestor); then other sharers in the village and, in case they refuse, to a stranger."

In the three newly prepared *wajib-ul-arzes*, the chapters dealing with pre-emption were headed "*babat hukuk malkane mahal*, (relating to the rights of the owners of the *mahal*). The *wajib-ul-arzes* of the first two mahals, *viz.*, Lala Bhairon Prasad and Ali Mazhar were to the following effect

If a Zamindar wishes to transfer by sale or mortgage the entire or a portion of his share, he can transfer it first to the co-sharers descended from the common ancestor, then to other co-sharers in the village (*deh*) and, in case they refuse, to a stranger.

The terms of pre-emption as regards the third mahal, *viz.*, Sheodial Ram were as follows.

Should any *pattidar* wish to transfer by sale or mortgage the entire or a portion of his share, he can transfer it first to the co-sharers descended from the common ancestor, then to other *pattidars*, and, in case they refuse, to a stranger.

After partition Lala Bhairon Prasad was the sole owner of his mahal and Saiyid Ali Mazhar was the sole owner of his mahal, but there were several owners of the

mahal Sheodial Ram. On the sale of the whole of the mahal Ali Mazhar to a stranger, Lala Raj Bahadur, the owner of mahal Bhairon Prasad, sued for pre-emption.

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The Courts below decreed the suit.

The defendant appealed.

*Sir Walter Colvin* (with him *Ghulam Mujtaba*), for the appellant submitted that as the chapter in which the pre-emption clause occurred gave a right of pre-emption to the owners of the *mahal* only and not to the owners of the village, the owners of one *mahal* had no right to any property situate in the other *mahal*. When partition was made and the village divided into *mahals*, the owners of the different *mahals* did not intend to keep the old custom intact. If they had wished so, they would have adopted the same language in the new *wajib-ul-arz*, but they did not do so and so they clearly intended to abrogate the custom. He further submitted that the owners of the first two *mahals* were at the time the sole proprietors and so the expressions in the new *wajib-ul-arzes* were their views only and it was not an official record of a local custom. He relied on

*Uman Parshad v. Gandharp Singh*, [1887] L. R., 14 I. A., 127 at p. 134.

*Sapruadhwaja Prasad v. Garuruddhwaja Prasad*, [1892] I. L. R., 15 All., 147 at p. 166.

*Jaiman Bibi, v. Mir Ali Husain*, [1898] A. W. N. 89.

*Gobind Ram v. Musetullah Khan*, [1907] A. W. N. 39

*Durga Charan Banerji* (with him *J. N. Chaudri* and *Jang Bahadur Lal*), for the respondent submitted that the old *wajib-ul-arz* was a record of custom and not of a contract, and in the new *wajib-ul-arz*, the owners of the first two *mahals* adopted that custom. They never said that they were creating a new custom, but simply adopted the old custom. If there were such a custom, all the sharers of the village would be governed by it. He relied on

*Auseri Lal v. Ram Bhajan*, [1905] I. L. R., 27 All., 602.

There was no question of a sole proprietor recording a new custom. The proprietor simply declared that he wanted the old custom to continue.

*Sir Walter Colvin* was not heard in reply.

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*Stanley, C. J.*

The judgment of the Court was delivered by

STANLEY, C. J, This is an appeal against a decree of the District Judge of Allahabad, affirming a decree of the Subordinate Judge. The suit was brought by the plaintiff Lala Raj Bahadur for possession of a mahal, situate in the district of Allahabad to which he claimed to be entitled by right of pre-emption. The mahal in question formed part of the village of Barauli which up to the year 1887 formed a perfect mahal. In the year 1887, it was sub-divided into three mahals by perfect partition. These mahals are (1) mahal Ali Mazhar (2) Bhairon Parshad and (3) Sheodial Ram. On partition, Ali Mazhar fell to the lot of one proprietor, as did also Bhairon Parshad. Both these mahals were in fact called after the names of the proprietors. In the mahal Sheodial Ram there were numerous share-holders. Prior to the partition of the village, it is said that a custom of pre-emption prevailed, which is set out in the *wajib-ul-arz* prepared in the year 1870. In the portion of this *wajib-ul-arz*, which treats of the rights of the owners of the village, it is provided in regard to pre-emption that if a sharer wishes to transfer his share by sale or mortgage, he can do so first to co-sharers, descended from a common ancestor, then to other co-sharers in the village, and in case of refusal by them, to strangers. On the partition three new *wajib-ul-arzes* were prepared, one for each of the new mahals. In the *wajib-ul-arz* for mahal Ali Mazhar, Chapter II deals with the rights of the owners of the mahal. It is to be noticed that it is not with the rights of the owners of the village but with the rights of the owners of that mahal. This shows that the *wajib-ul-arz* was intended to apply to that mahal alone. Notwithstanding that there was only one proprietor of that mahal we find that, through carelessness or oversight, a provision in regard to pre-emption was introduced, which is similar in its language to that contained in the original *wajib-ul-arz* of the parent village. Carelessness in the preparation of this *wajib-ul-arz* is disclosed in its opening words, in which it is stated that the *wajib-ul-arz* was prepared after partition, and the signatures of the sharers, showing their consent, were affixed to it. There being only one proprietor of the mahal, it is obvious that this introduction is entirely erroneous. In the third paragraph of the *wajib-ul-arz*, the proprietor, therein

described as zamindar, makes provision as to what should be done in the case of a transfer of the estate. The words of the *wajib-ul-arz* are as follows :—" If the zamindar wish to transfer by sale or mortgage the entire or a portion of his share, he can transfer it first to the co-sharers, descended from a common ancestor, then to other co-sharers in the village, and then in case they refuse, to a stranger." The language of the *wajib-ul-arz* of the mahal Bhairon Parshad is similar, but when we come to the *wajib-ul-arz* of the remaining mahal Sheodial Ram, in which there were a number of co-sharers, we find a different provision as to pre-emption embodied in it. The provision as to pre-emption in it is as follows :—" Should any *pattidar* wish to transfer by sale or mortgage the entire or a portion of his share, he can transfer it first to the co-sharers, descended from the common ancestor, then to other pattidars, and in case they refuse, to a stranger." Here it will be noticed that the right which is given is a right to the co-sharers in that mahal, not to co-sharers in the village, to pre-empt in case of a sale, or transfer. Now the custom introduced by this *wajib-ul-arz* is undoubtedly a new custom, at variance with the old custom. The *wajib-ul-arz* shows conclusively that so far as the co-sharers in that mahal are concerned, they abrogated and refused to recognize the previously existing custom and adopted a new one of their own making, which must be treated as a new contract between them. The proprietors of the other mahals were no parties to this arrangement.

The respondent in the present appeal is the sole owner of the *mahal* described as Bhairon Parshad, and he seeks to pre-empt a sale of the *mahal* known as Ali Mazher on the ground, as he alleges, that the old custom has not been abrogated but is still a subsisting custom. It is admitted by Mr. Durga Charan Banerji, the learned advocate for the respondents, that any right, which he has, is not one created by contract as the learned District Judge seemed to think, but he relies upon the old custom as a custom still prevailing. We think that upon the perfect partition of the village, so far as regards the two *mahals* of Ali Mazher and Bhairon Parshad, the old custom must be deemed to have been abrogated, these *mahals* respectively having come into the possession and ownership of single

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proprietors, and that those proprietors had no right, whatsoever, to introduce into the *wajib-ul-arzes* any provision, which should either control their own rights or the rights of their successors over the property. This matter was dealt with by their Lordships of the Privy Council, in the case of *Uman Parshad v. Gandharp Singh*, (1). Their Lordships there intimated that a *wajib-ul-arz* ought not to be entered on the record as a mere expression of the views of a proprietor of an estate, and they expressed their astonishment that the Oudh Courts had deliberately stated that "the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs" (page 135 of the judgment). In the case of *Superunddhwaja Prasad v. Garuaddhwaja Prasad* (2) TYRRELL, and BLAIR JJ. had occasion to consider this question, and pointed out in their judgment that it was never intended that a *wajib-ul-arz* should be used as an indirect means of giving effect to the wishes of a sole proprietor, with regard to the nature of his tenure, or the mode of devolution of the property, which should obtain after his death. Again in the case of *Jaiman Bibi versus Mir Ali Husen and another* (3) one of us sitting with Mr. Justice Dillon held that a document purporting to be a *wajib-ul-arz*, which was drawn up at a time when the mahal, to which it related, was owned by one single proprietor, could not be regarded as any evidence of a custom of pre-emption prevailing in that mahal.

In view of the foregoing facts and of the authorities to which we have referred, we are of opinion that the *wajib-ul-arz*, which has been relied upon, cannot be regarded as establishing or as being evidence of a custom of pre-emption prevailing in this mahal. This decision is in no way at variance with the decision of this court, in the case of *Auseri Lal and others versus Ram Bhajan Lal and others* (4). We, therefore, allow this appeal. We set aside the decrees of both the lower courts and dismiss the suit with costs in all courts including fees in this court on the higher scale.

J. B. L.

*Appeal decreed.*

(1) [1887] L. R. 14 I. A., 127.

(2) [1892] I. I. R., 15 All., 147.

(3) [1898] A. W. N., 89.

(4) [1905] I. L. R. 27 All., 602.

## ISMDAR KHAN.

*versus*

## AHMAD HUSAIN AND ANOTHER.\*

CIVIL.

1907.

December 21.

BANERJI, J.  
AIKMAN, J.*Adverse possession—Mortgagor dispossessing Mortgagee—proprietary rights not acquired—Mortgagees' rights—rights of co-mortgagor.*

By adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. Where, therefore, one, of the two mortgagors dispossesses a usufructuary mortgagee at a time when the mortgagors were not entitled to immediate possession and remains in possession for a period of twelve years he does not acquire full proprietary rights. He only acquires the mortgagee's rights which are rights of a limited nature and only these rights vest in him. *Muhammad Husain v. Mulchand* I. L. R., 27 All., 395; *Chinto v. Janki* I. L. R., 18 Bom., 51; *Bejoy Chandra v. Kally Prosunno* I. L. R., 3 Cal., 327; referred to.

When a mortgagor acquires such a possession against the mortgagee his co-mortgagor can recover possession of his share only by redeeming him. *Vilhoba v. Ganga Ram* 12 Bom. H. C. 180 referred to.

SECOND APPEAL against the decree of Maulvi Saiyid Tajammul Husain, Subordinate Judge of Ghazipur, confirming a decree of Babu Hari Mohan Banerji, Munsif.

Suit for possession of Zemindari property.

The material facts appear from the judgment.

*M. L. Agarwala*, for the appellants.

*M. Ishap Khan*, for the respondents.

The judgment of the Court was delivered by

BANERJI J. This appeal and the connected appeal No. 997 arise out of a suit brought by the plaintiff Ahmed Husain for possession of 9 bighas and odd biswas of land, being 3/5th of 15 bighas and odd, and for mesne profits. The said land forms part of a larger quantity of land which was the holding at fixed rates of one Rashida Bibi and was mortgaged by her under two mortgages one executed in favour of Bahadur Ali and Saddat Beg and the other in favour of Aiyam Uddin Khan. The mortgages were usufructuary and the mortgagees were put in possession. Rashida Bibi died leaving as her heirs her daughters Najman Bibi and Rabuan Bibi who sold

*Banerji, J.*

\* S. A. No. 998 of 1905.

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their equity of redemption to the plaintiff Ahmad Husain and to the first defendant Ismdar Khan on the 21st of June 1877. The former was the purchaser of a three-fifth share and the latter of the remainder. Other transactions relating to the property took place subsequently to which it is not necessary to refer for the purposes of these appeals. The plaintiff claimed possession of his three-fifths share in the land in question on the allegation that the defendant Ismdar Khan had wrongfully dispossessed the mortgagees and taken possession not only of his own share but also of the share of the plaintiff. The suit was resisted on various grounds the main plea being that the claim was barred by limitation. The court of first instance overruled this plea and made a decree in the plaintiff's favour for possession but dismissed the claim for mesne profits. This decree having been affirmed by the lower appellate court these two appeals have been preferred, one by the plaintiff and the other by the defendants. The plaintiff appeals against the portion of the decree which dismisses his claim for mesne profits. The defendant's appeal relate to the remainder of the claim. The contentions urged on behalf of the defendants are that they have held possession for more than twelve years adversely to the plaintiff and the claim is therefore time-barred and that in any case the plaintiff cannot obtain possession without redeeming the defendants.

Upon issues being referred by us to the court below that court has found that the mortgagees were dispossessed by Ismdar Khan, defendant, in June 1878 but that he never denied the plaintiff's title but on the contrary admitted it in a written statement and in a deposition. We have examined the written statement and the deposition referred to and are of opinion that they do not contain any admission of title. We must, however, accept the findings that the defendants dispossessed the mortgagees in June 1878 and that they never specifically denied the plaintiff's title.

As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly adverse to the mortgagees and as this adverse possession has continued for a longer period than twelve years the right of the mortgagees has under section 28 of the Limitation Act become extinct and has vested in the defendants. The pos-

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session of the mortgagees was not full proprietary possession but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of a limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee would also be adverse possession against the mortgagor, for example where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor. But as held in *Muhammad Husain v. Mulchand* (1), following *Chinto v. Janki* (2) that possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the mortgagors and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession the defendants cannot be held to have been in possession adversely to the plaintiff. As observed by Mr. Justice Markby in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (3) by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. We are therefore unable to accept the defendant's contention that their possession is adverse to the plaintiff and that the claim is time barred.

We are however of opinion that the plaintiff is not entitled to recover possession without redeeming the mortgages to which his share is subject. As we have already pointed out, the defendants by virtue of their adverse possession against the mortgagees acquired the rights of the mortgagees and, as held in *Vithoba v. Ganga Ram* (4), succeeded only to such estate as the mortgagees possessed. The plaintiff therefore

(1) [1905] I. L. R., 27 All., 395.

(2) [1892] I. L. R., 18 Bom., 51.

(3) [1878] I. L. R., Cal., 327.

(4) 12 B. H. C. R., 180 A. C. J.



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can only redeem the defendant, his equity of redemption being unaffected by the possession of the defendants. The ouster of the mortgagees by the defendants did not entitle the plaintiff to re-enter into possession. A similar view was held by Fulton J. in *Chinto v. Janki* (1). It is true the position of the defendants is that of co-mortgagors but that circumstance does not, in our opinion, make any difference so far as the interests of the plaintiff are concerned, it being an admitted fact that the mortgages have not been discharged. The claim for possession was not therefore maintainable. As the plaintiff did not seek to redeem the mortgages the suit as brought ought to have been dismissed. This will not preclude the plaintiff from bringing a properly framed suit for redemption. We accordingly allow this appeal and setting aside the decree of the court below dismiss the plaintiff's suit. Having regard to the circumstances of the case and the conduct of the parties we direct that they abide their own costs in all courts.

*Appeal decreed.*

(1) [1892] I. L. R., 18 Bom., 51, 54.

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January 9.  
STANLEY, C. J.  
BURKITT, J.

BANKA MAL AND OTHERS  
versus  
SHIAM LAL AND OTHERS.\*

*Suit for profits of partnership—Partnership entered into at Lahore—Business carried on at Hansi—Plaintiffs residents of Khurja—Alleged contract to remit profits to the plaintiff's place of residence not proved—Code of Civil Procedure (Act XIV of 1882), s. 20.*

Section 20, Code of Civil Procedure, enables the Court to stay a suit upon application made for that purpose. It does not empower the Court to entertain a suit which otherwise it would have no jurisdiction to entertain.

A partnership was entered into at Lahore, and the firm was carrying on the business at Hansi in the Panjab. Plaintiffs were partners of the firm residing at Khurja in the United Provinces. They brought a suit for their shares of the profits in the Court at Aligarh on the basis of an alleged special contract by virtue of which their share of the profits had been agreed to be remitted to Khurja. The alleged contract was not proved. *Held*, that the Court below ought not to have entertained the suit and should have returned the plaint for presentation to the proper Court.

FIRST APPEAL from a decree of the Subordinate Judge of Aligarh.

Suit for money.

\* F. A. 296 of 1905.

The Court below decreed the suit.

The Defendants appealed.

*Sundar Lal* (with him *J. N. Chaudri*), for the appellants.

*B. E. O'Connor* (with him *Motilal Nehru*), for the respondents.

STANLEY, C. J.—The suit which has given rise to this appeal was brought by two partners for shares of the profits of a partnership for the years 1959 and 1960 sambat, carried on by the firm at Hansi in the district of Hissar in the Punjab. The plaintiffs are the owners of a two anna share in the partnership and reside at Khurja in the United Provinces. The partnership was entered into at Lahore and the business is carried on as we have said at Hansi. The only reason for the institution of the suit in these Provinces, according to the plaint, is that a special contract was entered into between the partners whereby the plaintiffs' share of the profits was payable at Khurja, which is in the district of Bulandshahr within the Aligarh judgship, in these Provinces. The only evidence, adduced in support of the plaintiffs' allegation that there was such special contract, is that of the plaintiff Bansidhar who in the course of his evidence made the bold statement that "it was agreed to pay the profits to us (the plaintiffs) at Khurja." It is sought to support this alleged agreement by evidence that profits were as a matter of fact remitted to the plaintiffs at Khurja and this is not denied. The learned Subordinate Judge came to the conclusion upon the evidence that there was no such special agreement as was alleged by Bansidhar, but he entertained the suit on the ground that in the course of the litigation, an application was made to the Court by the defendants for a stay of proceedings under section 20 of the Code of Civil Procedure and that, that application was refused by his predecessor on the 9th of July 1904, and no appeal was preferred from the order then passed. He held in view of this ruling on the application so made under section 20 that the defendants had "no longer any right to say that the suit is not cognizable by this court." It appears to us that section 20 has no application. That section merely enables the court to whom an application for a stay of proceedings is made to stay the proceedings either finally or till further order,

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*Stanley, C. J.*

and to make such other order as it thinks fit as to the costs. It does not empower the court to entertain a suit which otherwise it would have no jurisdiction to entertain. We, therefore, have to consider and determine whether as a matter of fact the special agreement alleged by the plaintiffs was established by the evidence. As we have said the court below held that there was no evidence upon which it could act. We have pointed out that the only evidence, namely, that of Bansidhar, one of the plaintiffs, in support of the alleged special contract, was not believed. As against it we have before us the evidence of Banka Mal and Kirpa Ram, both of whom positively assert that no such agreement was entered into. Bansidhar himself in his evidence, says that Shamlal, Banka Mal and we were present at the time the agreement was made and that at that time there was no other defendant present, except Banka Mal. Even if it was agreed between these parties that the plaintiffs' share of the profits should be sent to Khurja, this agreement would not be binding upon the partners who were not present at the time and who were no parties to it. But in addition to this it is proved beyond any doubt that a deed of partnership was drawn up and executed and any agreement outside that deed would not be binding upon the partners other than those who entered into it. We agree with the court below that there was no special agreement. This being so the court below ought not to have entertained the suit; so soon as it came to a finding that there was no special agreement entered into at the time of the partnership for payment of the share of the plaintiffs at Khurja, he ought to have held that he had no jurisdiction to decide the suit and to have handed the plaint back to the plaintiffs for presentation in the proper court.

We accordingly allow the appeal, set aside the decree of the court below with costs in both courts, including fees in this Court on the higher scale, and we pass the order which the court below ought to have passed when it found that the special agreement had not been proved; that is we direct that the plaint be handed back to the plaintiffs to be presented in the proper court. As a result of our ruling the objections filed under section 561 of the Code of Civil Procedure fall to the ground.

*Appeal decreed.*

## NAND KISHORE.

VERSUS

## ANWAR HUSAIN AND ANOTHER.\*

*Registered lease—Condition for payment in advance—Validity of payments in advance as against an auction purchaser.*

*Bona fide* payment of rent in advance by lessees to the lessor under the condition of a registered lease before sale of the property is binding upon the purchaser as the lease being a registered one it is his duty to make enquiries whether any payment was made under its terms.

SECOND APPEAL from the decree of D. R. Lyle Esq., District Judge of Moradabad reversing a decree of Ajudhia Prasad Esq., Assistant Collector.

Sajjad Husain was the owner of certain immoveable property. On 1st September 1898, he leased the property to Anwar Husain, respondent, for 10 years, with a condition that the lessee would have to make payments of rent in advance if required by the lessor to do so. On 25th December 1902, Anwar Husain paid Rs. 1,520 to Sajjad Husain under a receipt, as payment of rent in advance. In 1903 Nand Kishore, appellant, purchased the property partly by private sale and partly at auction held in execution of a simple money decree, and in 1904 sued the lessee in the Revenue Court for arrears of rent due after the date of sale. The defendant lessee pleaded payment in advance in good faith to the former proprietor before the plaintiff's purchase, in accordance with the terms of the registered lease of 1898. The suit was decreed by the court of first instance. On appeal by the lessee, the decree was set aside, and the suit was dismissed.

Plaintiff appealed.

*Sir Walter Colvin* (with him *W. K. Porter* and *Girdhari Lal Agarwala*), for the appellant.

*Abdul Majid*, for the respondent.

The judgment of the Court was delivered by

STANLEY, C. J.—The question for determination in this litigation is a novel one. One Sajjad Husain was the owner of certain property at or prior to the year 1898. On the 2nd of September of that year, he granted a lease to the defendant

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\* S. A. 881 of 1905.

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*Stanley, C. J.*

of portion of this property for a term of 10 years, that is from 1306 to 1315 *fasli* (inclusive). The lease contains a very unusual provision to the effect that if at any time during the currency of the lease, the lessor should demand any portion of the rent in advance from the lessee, the latter would be bound to pay it on obtaining a receipt. The lease was registered and is not disputed here. On the 25th of December 1902 a sum of Rs. 1,520 was paid in advance for rent by the lessee to the lessor, on demand made by the lessor, in pursuance of the provision in the lease to which we have referred. This payment, it is found, satisfied the rent payable up to the end of 1314 F. On the 20th of October 1903, the plaintiff appellant purchased the property so leased, at a sale in execution of a decree obtained against Sajjad Husain. He instituted the suit, out of which this appeal has arisen, for recovery of the rent for the years 1311 and part of 1312 *fasli*, which had been already paid. He was met by the defence that the rent for that period had already been paid to Sajjad Husain, under the provision in the lease. The question is whether under such circumstances, this is a good defence to the suit. As we have said, the lease is a registered document, and the plaintiff appellant must be deemed to have purchased with knowledge of it. It was open to him when he was contemplating the purchase, to make inquiry of the lessor or lessee, as to whether or not any rent had been paid in advance according to the provision in the lease. He appears to have neglected to do so and purchased the property, no doubt in the belief that he would be entitled to the rent from the date of purchase, for the remainder of the term, but for the fact that the lease was a registered document and that the rent had been paid *bona-fide*, in advance, in accordance with the condition in it, the plaintiff would probably have been in a position to establish his claim, but in view of the fact that the lease was registered and that payment of the rent claimed had been made, in accordance with it *bona fide*, before the date of the plaintiff's purchase, we are unable to dissent from the decision of the learned District Judge. The payment of rent before it becomes due is not ordinarily a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance

to the lessor with an agreement on his part that when the rent becomes due, such advance will be treated as a fulfilment of the obligation to pay the rent. (See *Nicholls v. Saunders* (1). We must hold in view of the facts in this case that the rent, sought to be recovered in this suit, was satisfied pursuant to the provisions of the lease by the advance previously made. The plaintiff appellant cannot complain, inasmuch as he did not take the precaution of making inquiry as to whether or not any money had been paid in advance, as provided for by the document. We, therefore, dismiss the appeal with costs including fees in this Court on the higher scale.

*Appeal dismissed.*

(1) L. R. 5 C. P., 589.

LACHMI AND ANOTHER

*versus*

GANGA DIN AND OTHERS.\*

*Joint property—Co-sharer building on part of the property without permission of other joint owners—No direct loss—Injunction.*

One of several joint owners of land is not entitled to erect a building on the joint property, without the consent of the other joint owners, notwithstanding that the erection of such building might cause no direct loss to the other joint owners. If one co-sharer builds without consent on the joint land, a mandatory injunction ought to be granted. *Shadi v. Anup Singh*, I. L. R., 12 All., 436; *Najju Khan v. Imtiaz-ud-din*, I. L. R., 18 All., 115, followed.

Judgment of RICHARDS, J., reversed.

APPEAL under section 10 Letters Patent against the decision of RICHARDS, J.

The facts appear from the judgment of

RICHARDS, J.—In this case the plaintiffs and defendants were co-sharers in certain zamindari property. The defendants built some pacca rooms on land which has been found to be, and undoubtedly is, the joint property of the co-sharers. Strictly speaking the defendants had no right to build these rooms, and the plaintiffs were within their right in instituting the present suit. It has been found, however, and I have not the least doubt that the finding is correct, that the buildings in question were made on part of the joint property which adjoined the defendants' house, on land which had been in the use of the defendants, and which had not

\* L. P. A. 37 of 1907.

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*Richards, J.*

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*Richard, J.*

been in the use of the plaintiffs. Except so far as the building of these rooms might be an assertion of an adverse title in the defendants against the plaintiffs, the erection of the buildings caused no injury or damage to the plaintiffs. This being the case, and it clearly appearing from the judgment of the lower appellate court that the defendants are given no exclusive right to the land on which the buildings have been erected, the case resolves itself into a question whether or not a mandatory injunction should issue for the demolition of these buildings. If it were clear that the plaintiffs had stood by and allowed the erections to be made without complaint, and if it were also clear that the defendants never set up any adverse title, I think the plaintiff's suit should have been dismissed with costs. It, however, appears that very shortly after the erection of the buildings, the suit was instituted, and there is an allegation in the plaint that the defendants were warned that they must not build. If I were certain that the defendants had really made the case that the plot of land was not joint property, I would be obliged to allow the present appeal. However, after careful consideration of the judgments of both the lower courts, I have come to the conclusion that the case, put forward by the defendants, was that they and their predecessors had been for many years using this particular plot. This case is probably quite true. But such user would never have given them the right to the particular plot as against the other co-sharers. In partition, if ever the property came to be partitioned, this plot, like all the rest of joint property, would form portion of the joint property, and would be partitioned according to the law regulating partition, notwithstanding for any number of years it had been separately enjoyed. I have come to the conclusion not without some hesitation that I ought not to disturb the decision of the lower appellate court. As, however, the defendants, in form at least, did put forward the case of adverse possession, and as in that view the litigation may have become necessary, so that the plaintiffs should never be able to allege that the property in question was any thing other than joint property, I think the plaintiffs ought to get their costs in the court of first instance, and also in the lower appellate court. No costs will be given to either side of this appeal. I, accordingly, modify the decree of the court below by directing that the plaintiffs will be paid, by the defendants, the costs in the court of first instance and in the lower appellate court. Each party will abide their own costs in this court. In other respects, I dismiss the appeal.

Plaintiffs appealed.

*Girdhari Lal Agarwala*, for the appellants, submitted that one co-sharer had no right to build on the joint land, without the consent or acquiescence of the other co-sharers, even, if there was no injury done to other co-sharers by the building. He added that the promptitude with which the plaintiffs sought the assistance of law, the present suit having been instituted within a week of the commencement of the erections com-

plained of, gave the plaintiffs a right to have the constructions removed. The circumstance, that the land in dispute had been in exclusive use of the defendants, gave them no right to make the constructions. He relied on the Full Bench case of

*Shudi v. Anup Singh*, [1890] I. L. R., 12 All., 436.

The respondents were not represented.

The judgment of the Court was delivered by

STANLEY, C. J.—The facts of this case are few and simple. The plaintiffs and the defendants are admittedly joint owners of a certain village, or part of a village. This has been found by the courts below. The defendants, on a portion of this village, setting up an adverse claim, erected walls which interfere with the plaintiff's rights. At the earliest opportunity, the plaintiff objected to the erection of these walls, but notwithstanding their opposition to the building, defendants proceeded with the work, and in consequence the suit, out of which this appeal has arisen, for a mandatory injunction to restrain the defendants from building, and for the demolition of the walls, was instituted. The court of first instance decreed the plaintiff's claim, but upon appeal the learned Subordinate Judge reversed the decision of the lower court, being of opinion that inasmuch as the land had been in the use of the defendants and not in the use of the plaintiffs, he, in the exercise of his discretion, was entitled to refuse the injunction. An appeal was preferred to this Court. The learned Judge, by whom the appeal was heard, had some hesitation in arriving at his conclusion. He says "I have come to the conclusion not without some hesitation that I ought not to disturb the decision of the lower appellate court" and he affirmed the decision of the lower appellate court, but inasmuch as the defendants put forward the case of adverse possession, which rendered the litigation necessary, he refused to give to either side the costs of the appeal, and declared the plaintiff entitled to her costs in the court of first instance, and also in the lower appellate court.

Now it is well settled in this Court that one of several co-sharers in a village has no right to erect buildings upon common land against the wishes of the other co-sharers. A

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Full Bench in the case of *Shadi v. Anup Singh* <sup>(1)</sup>, held that in a case where some co-sharers proceeded to erect *kachha* buildings upon common land, and another co-sharer objected to this, and brought a suit for an injunction, he was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building, so far as it had proceeded, should be pulled down and prohibiting the defendant from building on that land as exclusive owner at any future time. In the more recent case of *Najju Khan v Imtiaz-ud-din* <sup>(2)</sup>, the facts of which are very similar to those of the case before the Court, a Division Bench held that one of several joint owners of land is not entitled to erect a building upon the joint property, without the consent of the other joint owners, notwithstanding that the erection of such building might cause no direct loss to the other joint owners. In the judgment, it is pertinently observed. "The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favour one co-sharer, adversely to the other co-sharers, making a partition in his own favour, and selecting the portion of the land he likes by erecting a building upon it." In view of these decisions and bearing in mind the fact that the plaintiff lost no time in raising his objection to the erection of the buildings, we think that the decrees of our learned brother and also of the lower appellate court cannot be maintained. We accordingly set aside these decrees, and restore the decree of the court of first instance with costs in all Courts.

*Appeal decreed.*

(1) [1890] I. L. R., 12 All., 436. (2) [1890] I. L. R., 18 All., 115

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January, 4.

STANLEY, C. J.  
BANERJI, J.

RAJ NATH SINGH

*versus*

PALTU AND OTHERS.\*

*Vendor and purchaser—Non-payment of consideration—Rights of  
Purchaser—Equities.*

Mere non-payment of purchase money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser, notwithstanding such non-payment can maintain a suit for possession. *Shib Lal v. Bhagwan Das*, I.L.R., 11 All., 244; *Umed Mal v. Davu*, I. L. R., 23 Bom., 525 referred to.

S. A. No. 1007 of 1906

A court is entitled to pass a decree in favour of the plaintiff for possession, subject to the equities which exist in favour of the defendant.

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SECOND APPEAL against the decree of L. Marshall Esq., District Judge of Banda, affirming a decree of Saiyed Hamid Husain, Munsif of Hamirpur.

RAJ NATH SINGH  
v.  
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Suit for possession of property.

The facts appear from the judgment.

*J. N. Chaudri*, for the appellant.

*J. N. Mukerji*, for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—This is a second appeal against a decree of the lower appellate court dismissing the plaintiff's suit for recovery of possession of a 4 pie share in a village. This share was conveyed to the plaintiff by a sale-deed of the 6th of May 1898 which was duly registered. Possession was not obtained, and the present suit was therefore brought. In his plaint, the plaintiff alleged that the full consideration for the sale, namely, Rs. 200 had been satisfied. In their defence, the defendants alleged that the consideration had not been paid, and it is found by both the lower courts that this was so. In consequence of the finding that no portion of the consideration had been paid, the learned District Judge had held that there was in fact no sale of the property. He observes in the course of his judgment "Thus not any portion of the consideration has been paid. Non-payment of the "promised portion would not invalidate the "sale" and the lower court has recognized this principle. But when the consideration is supposed to be "part paid and part promised" and not even the "part paid" amount has actually been paid, the provisions of section 54 of the Transfer of Property Act have not been fulfilled, and the transaction cannot be called a sale at all." We are unable to agree with the learned District Judge as to this. According to the sale-deed the consideration was agreed to be paid as follows:—Rs. 100 to be credited in part payment of past debts, Rs. 20 to be paid in cash and Rs. 80 the balance to be paid to a mortgagee of the property. Now we must take it, on the

*Stanley, C. J.*

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findings, that no portion of the purchase money has been paid or satisfied. The vendee did not fulfill his obligation to pay it. It has been held and we think rightly that the non-payment of the purchase money does not prevent the passing of the ownership of purchased property from the vendor to the purchaser and the purchaser notwithstanding such non-payment can maintain a suit for possession of the property (see *Shib Lal v. Bhagwan Das* (1)). It was so held also in the case of *Umed Mal Motiram v. Davu Bin Dhondiba*, (2) and again in the case of *Sagaji v. Namdar* (3) in which the evidence showed that there was a *bona fide* sale of property by the defendant to the plaintiffs and it was held that this sale was a completed transaction, notwithstanding the fact that no portion of the consideration had been paid, and that the only remedy of the vendor for the consideration was a suit for recovery of the amount of it. We think, therefore, that the courts below were wrong in dismissing the plaintiff's claim. In the case of *Shib Lal v. Bhagwan Das*, to which we have referred, it was laid down by Mahmood J., rightly, we think, that equities may exist in favour of defendant to a suit like the present one, so as to subject the decree to restrictions and conditions appropriate to the circumstances of the case. Here, there is such an equity arising out of the non-payment of the purchase money by the plaintiff, and regard ought to be paid to it in any decree which the court may pass. Accordingly we allow the appeal. We set aside the decrees of both the lower courts and we order and direct that if within six months from this date the plaintiff pay to the defendants the sum of Rs. 200 the amount of the purchase money, the property mentioned in the plaint be delivered to him, but in default of such payment, the plaintiff shall forfeit his right to recover the property. If the plaintiff do not pay the purchase money within the time aforesaid, his suit will stand dismissed with costs in all courts. If he, however, do pay the purchase money within such period, then in view of the fact that the plaintiff alleged in his plaint that he had paid the entire of the purchase money contrary to the fact, we think that both parties should abide their own costs in the

(1) [1888] I. L. R., 11 All., 244.

(2) [1899] I. L. R., 23 Bom., 525.

(3) 1878] I. L. R., 2 Bom., 547.

courts below, and we order accordingly. As to the costs of this appeal, the plaintiff, we think, if he pay the purchase money, is entitled to them and we so order, fees being calculated on the higher scale.

*Appeal decreed.*

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RAJ NATH SINGH  
v.  
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*Stanley, C. J.*

## GANGA DEI

*versus*

BADAM AND OTHERS.\*

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*January, 18.*

STANLEY, C. J.  
BURKITT, J.

*Landlord and tenant—Tenant's right to trees on the holding—Injunction.*

The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zamindar, and that the tenant has no right to cut and remove such timber. But, in the absence of custom or of a contract to the contrary, a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists.

Hence where the courts below granted to the plaintiff, zamindar, an injunction to restrain the tenants from offering obstruction, to the cutting down, and removal of the trees upon the holding, *held* (affirming the judgment of RICHARDS J.) that the injunction was improper, and had been rightly refused.

APPEAL under section 10 of the Letters Patent against the judgment of Richards, J.

The material facts appear from the judgment of RICHARDS, J. which is reported at page 452 of the Allahabad Law Journal, Reports, Vol. IV.

*Durga Charan Banerji*, for the appellant.

*R. Malcomson*, for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—The plaintiff appellant is a Zamindar and as such instituted the suit, out of which this appeal has arisen, for a declaration of her title to the trees growing on the cultivated and uncultivated land in Mauza Kanchanpur, in the possession of the defendants who are her tenants. She also prayed for a perpetual injunction, prohibiting the defend-

*Stanley, C. J.*

\* L. P. A., No. 49 of '07.

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ants from offering any obstruction to the cutting down and removal by her of the trees on their holdings. The defendants set up a right by custom to cut the trees in question, but this plea was rejected, and a declaration of title was given to the plaintiff appellant as prayed for in her plaint. The two lower courts also granted to the plaintiff appellant the relief which was claimed by way of injunction, but upon appeal our brother RICHARDS reversed their decrees and allowed the appeal in respect of the injunction. From this decision the present appeal has been preferred under the Letters Patent. We are of opinion that the learned Judge of this court was perfectly right in the decision at which he arrived. The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zamindar and that the tenant has no right to cut and remove such timber. But it appears to us to be clear that in the absence of custom or of a contract to the contrary, a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. A tenant has a right to enjoy all the benefits of the growing timber on his land during his occupancy. If the zamindar desires to have the privileges, during a tenancy, of entering upon his tenant's holding and cutting down and removing timber, he must procure a special stipulation from his tenant in that behalf. In the case of *Sheikh Abdul Rahman v. Dataram Bashee* <sup>(1)</sup> the learned Judges laid down that while a zamindar has a right in the trees which the court should maintain, the tenant has a right to enjoy all the benefits that the growing timber may afford him during his occupancy, but has no power to cut down the timber, and convert it to his own use. We hold, therefore, that our learned brother was correct in his decision and we accordingly dismiss the appeal with costs.

*Appeal dismissed.*

(1) [1867] W. R., 367.

MAHADEO PRASAD  
*versus*  
 BINDESHRI PRASAD.\*

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Jan. 28.

AIKMAN, J.  
 KARAMAT  
 HUSAIN, J.

*Guardian and Wards Act (VIII of 1890)—Rival claimants for guardianship—Arbitration—Power to refer dispute to arbitration—Code of Civil Procedure, (Act XIV of 1882), section 647.*

*Per curiam*—Rival claimants, to be appointed as guardian of a minor, are not in the position of ordinary litigants and cannot refer the matter in dispute to arbitration. The guiding principle, in appointing guardian, is the consideration what is best for the welfare of a minor.

*Per KARAMAT HUSAIN, J.*—Section 647 of the Code of Civil Procedure deals with procedure and procedure alone and does not touch the substantive law of arbitration. The consent of parties, in a proceeding for appointment of guardian, does not give the Judge any power to refer the matter to arbitration.

The respondent, Bindeshri Prasad, and Kedarnath minor were brothers. For sometime about a year previous to these proceedings, Kedarnath went to live with his father-in-law, Mahadeo Prasad, owing to the alleged ill-treatment by his brother. Mahadeo Prasad, as next friend of Kedarnath minor, instituted a suit for partition against Bindeshri Prasad, in the Court of the Subordinate Judge. A question arose in the suit whether the minor, Kedarnath was duly represented by Mahadeo, and the Subordinate Judge directed that Mahadeo Prasad should obtain a certificate of guardianship from the District Judge. Bindeshri Prasad and Mahadeo Prasad put in separate petitions for their appointment as guardian of the minor. While the case was pending in the District Court, both parties made an application that the matter be referred to the decision of Kumar Bharat Singh, whom they named as arbitrator. The arbitrator decided that the respondent be appointed guardian of minor's person and property. The District Judge, acting upon this award, appointed the applicant as guardian.

The opposite party, the father-in-law, appealed.

*Kedarnath* (for *Satya Chander Mukerjee*), for the appellant. I submit that this being a matter for the appointment of a guardian, could not be referred to arbitration.

\* F. A. F. O. 71 of 1907.

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(AIKMAN, J.—How do you get over section 647 of the Civil Procedure Code?)

That section only makes the procedure prescribed in the Code applicable to the proceedings, so far as possible. But the point that I raise is a point of jurisdiction. Under Hindu Law, the King is the guardian of all minors, (Mayne's Hindu Law, section 211), and it is an appointment by the King that vests the guardianship in the relations of a minor. The policy of Act VIII of 1890, is to the same effect.

There is no right to any property or office that is fought out between the parties to a proceeding under the Guardian and Wards Act. Each party to such a proceeding seeks to be appointed guardian. Guardian occupies a fiduciary relation towards his ward. (Section 20 of Act VIII of 1890.) The proceedings, under the Act, are of a special character. A Judge has power not to entertain an application for guardianship at all. (Section 11 of Act VIII of 1890.) There is no such power regarding an ordinary civil suit. The proceedings for appointment of a guardian are in the nature of proceedings *in rem*. (Section 11 (I) (a) (iv) of Act VIII of 1890.) There is no direct authority on the subject. But I draw the inference by analogy to cases decided under other acts.

By Act No. 20 of 1863 courts are empowered to appoint managers of Religious Endowments, while under Act No. VIII of 1890 they are empowered to appoint Managers to the estates of infants. It is a power of appointment that is vested in the courts under both Acts. The objects of both the Acts being similar the following case is in point.

*Karedla v. Vemavarapa*, [1902] I. L. R., 26 Mad., 361.

There is a total absence of any provision to refer to arbitration, proceedings under Act VIII of 1890, while in Act XX of 1863, there is an express provision in section 16, to refer certain matters to arbitration.

In matters of appointment of managers whenever Legislature permitted a reference to arbitration it has expressly done so. The absence of such provision in Act VIII of 1890 makes it clear that Legislature never contemplated that the District Judge, who is authorized to appoint guardians to infant's estates, should delegate his duties to an arbitrator. The Judge is bound to consider the matter himself.

*L. M. Banerji*, (for *S. C. Banerji*) for the respondent. The question is whether the action of the District Judge appointing an arbitrator is correct. This is not a case of passing a decree upon the award. The order was made by the Judge. The case is distinguishable from the cases where submission as to the *factum* of the will is referred to arbitration by an executor and a *caveator* as in

*Ghallabhai v. Nandurati* [1896] I. L. R., 21 Bom., 335, at 340.

The reasoning in that case does not apply and the special reason for the rule laid down by FARRAN, C. J. is given at pages 340 and 341. The court has a power to appoint a guardian, who is not the legal guardian, if it is for the welfare of the minor. It is nothing more than an irregularity to have looked at the award of the arbitrator. There was no evidence before the court and the court appointed the legal guardian.

The following judgments were delivered

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Allahabad, appointing a guardian of the person and property of a minor, named Kedar Nath, under the provisions of the Guardians and Wards' Act 1890. The appellant is the father-in-law of the minor. The respondent, who was appointed guardian by the learned Judge, is the minor's elder brother. Each of the parties to this appeal claimed to be appointed guardian. It appears that on the joint application of the parties, the question as to who should be appointed guardian was referred to the arbitration of Kuar Bharat Singh, a gentleman against whom no imputation whatever is made. It appears from the order of the learned Judge that he decided the question as to who should be the guardian solely on the award of the arbitrator. In appeal here it is contended that under Act No. VIII of 1890, the District Judge was not competent to refer to an arbitrator the question as to who should be appointed guardian. In my opinion this contention must prevail. Some special Acts, for instance, the Act dealing with Religious Endowments No. XX of 1863, empower a court to refer matters in difference to arbitration. No such power is given in the Guardians and Wards Act, and it is easy to understand why this should be so. When there are rival claimants to be appointed as

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guardian these claimants are not in the position of ordinary litigants who can refer any matter in dispute between them to a tribunal selected by themselves. The guiding principle in appointing guardian is the consideration what is best for the welfare of the minor. In my opinion the intention of the law is that the question as to who is the best guardian of the minor's interests is one to be decided by the court, and that a court cannot delegate its functions to any arbitrator, however competent and above suspicion that arbitrator may be. If rival claimants to a certificate of guardianship are allowed to refer the dispute between them to an arbitrator a door would be opened to collusion and the interests of minors might suffer. For these reasons I am of opinion that this appeal must be sustained.

*Karamat  
Husain, J*

KARAMAT HUSAIN, J.—This is an appeal from an order passed by the learned District Judge of Allahabad under the Guardians and Wards Act No. (VIII of 1890). The facts are these:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad, under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother, Kedarnath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad grand-father and father of Kedar Nath's wife, Mussammat Janki.

The learned District Judge, with the consent of the parties referred the matter to arbitration, and the arbitrator by his award dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the learned District Judge, on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and property of the minor. Mahadeo Prasad appeals to this court against this order. One of the grounds of appeal is that the learned District Judge had no power to refer the matter to arbitration and to accept the award.

This objection is in my opinion sound. The State is theoretically the guardian of all its minor subjects. As an old writer observes "the law protects their persons, their rights and estates, excuseth their laches and assists them in their plead-

ings ; the judges are their counsellors, the jury are their servants and the law is their guardian" (Trevelyan on Law relating to Minors, page 15). The State, being the guardian of all minor subjects, delegates by legislation its guardianship to such of its tribunals as it deems fit. In British India, the guardianship of the person and property of minors has been given to District courts, and they have been authorized to appoint guardians in certain *specific* ways. The law on the subject is now contained in the Guardians and Wards Act (No. VIII of 1890). The course to be followed by the District court in appointing or declaring a guardian is prescribed in sections 11 (1), 13, 17 and 46. Under section 13, it shall bear such evidence as may be adduced in support of or in opposition to the application. Under section 17, it shall be guided by what.....appears .....to be for the welfare of the minor. Section 46 allows the District Court to call upon the Collector or upon any court subordinate to it for a report on any matter arising in any proceeding under the Act and treat the report as evidence.

Such are the powers given by the Act to a District Court for the purpose of appointing or declaring a guardian of the person or the property of a minor. There is nothing in the Act to authorize a District Court to refer the question of the appointment or declaration of a guardian to arbitration. The learned District Judge had, therefore, no power to refer that matter to arbitration.

It might be contended that section 647 of the Code of Civil Procedure empowered the learned District Judge to make such reference, but there is no force in this contention. The section in my opinion deals with procedure and procedure alone and does not touch the substantive law of arbitration. The reference by the learned District Judge in the case before me was, no doubt, made with the consent of the parties but that would give him no power. Besides, a party is allowed by law to submit any dispute regarding any right of his own to arbitration, but the question of guardianship stands upon a different footing and is not one of the private civil rights of any private person.

For the above reasons, I hold that the course, adopted by the learned District Judge, was contrary to law, and I therefore

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set aside his order and remand the case under section 562 of the Code of Civil Procedure with directions to re-admit the application under its original number in the register and proceed to determine it in accordance with law.

By the Court.—The appeal is allowed, the order of the learned District Judge is set aside and the case is remanded to his court with directions to re-admit the application under its original number in the register and proceed to determine it according to law. Costs here and hitherto will abide the event.

*Appeal decreed.*

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January 18.

STANLEY C. J.  
BURKITT J.

SHEORAM TIWARI

*versus*

THAKUR PRASAD AND OTHERS.

*Practice—Proceedings on Sunday—whether void—Lord's Day Act—application to India.*

A Munsif went on an inspection on Sunday. While there the parties entered into a compromise which was recorded by him and a decree passed on the spot. *Held* that the proceedings of the Munsif were not vitiated by the fact that they were taken on a Sunday. Lords Day Act does not apply to India. *Paramshook v. Rasheed-ud-dowlah*, 7 Mad., H. C. R., 285 referred to.

APPEAL under section X of the Letters Patent from the judgment of Griffin J., confirming a decree of W. D. Burkitt Esq., District Judge of Allahabad,

Suit for possession of a plot of land.

The facts of the case were as follows :—

The Munsif of Allahabad went on a local inspection on a Sunday, and while he was on the disputed premises, some terms of compromise were agreed upon by the parties which were embodied in a *rubkar* of the Court on which a decree was passed. The decree was impeached on the ground that it was void as it had been passed on a Sunday. The District Judge held that technically this plea was valid, but as the decree had been passed on a lawful compromise, no appeal lay. In second appeal the decree of the District Judge was confirmed by

GRIFFIN, J.—On Sunday, the 18th of June 1905, the Munsif made an inspection of the spot. The parties came to a compromise which was

embodied in a rubkar. The Munsif on the same day gave a decree on the compromise. The defendant appealed to the District Judge, who, while upholding the defendant's contention that the decree was void, having been passed on a *dies non*, dismissed it on other grounds. The defendant appeals to this Court on the ground that the decree, being passed on a Sunday, was null and void. It is admitted that there is no authority of this Court directly bearing upon the question raised in this appeal. I am referred to the ruling in *Ram Das Chakrabati v. The Official Liquidator, Cotton Ginning Company, Limited, Cawnpore*. (I. L. R., 9 All., 366). I am asked to infer from this ruling that a decree passed on a Sunday should be held null and void. No such inference, in my opinion is warranted. For the respondents it is contended that the Court of first instance in disposing of the case on a Sunday committed a mere irregularity, which is covered by the provisions of section 578 of the Code of Civil Procedure. The proceedings were held on the Sunday by consent of parties. I am of opinion that under these circumstances the Munsif in disposing of the case the same day committed merely an irregularity. It is not shown that this irregularity affected the merits of the case or that the Munsif had no jurisdiction.

In a case reported in Vol. 16 of the Weekly Reporter (Civil Rulings), p. 230 (*Ununto Ram Chatterjee v. Protub Chunder Shiromonee*) the objection taken was against the admission of a plaint on a Sunday. The objection was overruled.

I dismiss the appeal with costs.

Defendant appealed.

*Satya Chandra Mukerji*, for the appellant, submitted that Sunday was a *dies non*, and no judicial work could be done by a Civil Court on that day under section 15 of the Bengal Civil Courts Act (XII of 1887). The High Court at Allahabad specified certain days as close holidays in Civil Courts subordinate to it. The list of such close holidays did not mention Sundays, and taking the list for 1908, only those Sundays were specified therein which were to be observed as close holidays for any other cause.

*Ram Das v. The official liquidator* [1887] I. L. R., 9 All., 366.

It was held merely that the functions of the Courts were suspended on close holidays for the convenience of the public or of certain communities, and if those functions were exercised on such days by consent of parties, the proceedings were not vitiated. The decision proceeded expressly on the ground that close holidays under the Bengal Civil Courts Act were not *dies non*, and they, therefore, did not take into consideration the cases decided under the Lord's Day Act in

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England. As a matter of fact all Courts in India were closed on Sundays but not under the Bengal Civil Courts Act. The presumption, therefore, was that they were closed under the Lord's Day Act. The remarks

*In the Matter of E. D. Sinclair* [1874] 2 N. W. P. H. C. R., 179.

were pure *obiter dicta*, and should not be accepted as conclusive. Any observations regarding the legality or otherwise of proceedings taken on a Sunday were not necessary for the decision of that case. If the limitation expired on a Sunday the plaint could be presented on the next court day, The compromise was void and should be set aside.

*Abdul Majid*, for the respondent, contended that the Lord's Day Act did not apply to India. That Act not only made all judicial proceedings taken on a Sunday entirely void, but also provided that all contracts entered into on that day were invalid. It had never been held in India that any contract entered into by natives of India on the Sabbath day was void.

*Paramshook v. Rasheed-ood-dowlah*, 7 M. H. C. R., 285.

The judgment of the Court was delivered by

Stanley, C. J.

STANLEY C. J.—We are of opinion that the proceeding of the Munsif was not vitiated by the fact that it was taken on a Sunday. At the utmost it seems to us that the proceeding may have been irregular but that any irregularity was cured by the consent of the parties. It is not necessary for us to determine whether the Lord's Day Act applies to this country but we should be slow to hold that it did, as it would be manifestly inconvenient to do so, the Act being entirely unsuited to the circumstances of the country. We may mention that in the case of *Param Shook Dass v. Rasheed-ood-Dowlah Bahadoor and others*<sup>(1)</sup>, it was held that it had no application in this country. We dismiss the appeal with costs.

*Appeal dismissed.*

(1) 7 Mad., H. C. R. 285.

## FIROZ BEGAM

*versus*

ABDUL LATIF AND ANOTHER.\*

*Code of Civil Procedure (Act XIV of 1882), section 549, —Appeal—Order rejecting application for rehearing of appeal dismissed under section 549.*

No appeal lies against an order refusing to re-admit an appeal rejected on the ground of the failure of the appellant to furnish security for the costs of the respondent under section 549 of the Code of Civil Procedure. *Lekha v. Bhauna*, I. L. R., 18 All., 315 referred to.

APPEAL from an order of D. R. Lyle, Esq. District Judge of Moradabad.

The facts were as follows :—

The plaintiff obtained a decree for dower against the first defendant in the Court of the Native State of Rampur. On the basis of that decree she instituted the present suit in the Moradabad Court impleading her co-wife as a defendant. The suit was dismissed by the Court of first instance. In appeal the plaintiff was required to furnish security on or before the 15th of December, under section 549 of the Code of Civil Procedure, for the costs of the respondent. She failed to furnish security in time but applied for extension of time, on the 19th December but her appeal was rejected on the 20th of December 1906. On the 15th of February 1907 she applied for the restoration of the appeal offering to furnish security, but her application was rejected.

The plaintiff appealed.

*Tej Bahadur Sapru*, for the respondents, raised a preliminary objection to the hearing of the appeal. He submitted that an order rejecting an appeal under section 549 of the Code was not appealable either as a decree or order. An appeal was a creature of statute and no one could appeal as a matter of right and unless the Code provided for an appeal, no appeal lay. Section 588 clause 27 provided for appeals in certain cases specified in that clause but there was no mention of appeals against orders rejecting appeals on failure, to furnish security under section 549, C. P. C. He pointed out the difference between Ss. 381 and 549 and urged that there was nothing like this second clause of s. 381 in s. 549 C. P. C.

*Lekha v. Bhauna* [1895] I. L. R., 18 All., 101.

\* F. A. F. s. 24 of 1907.

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1908.

January 29.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

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*Mohammad Ishaq*, (with him *Abdul Majid*), for the appellant, submitted that an order rejecting an application was appealable under section 588, cl. 27. Such an application was made, whether rightly or wrongly, and was rejected. An appeal, therefore, lay. An application for restoration of the appeal could be made.

*Balwant Singh v. Daulat Singh* [1886] 1. L. R., 8 All. 315, P. C.

The judgment of the Court was delivered by

*Aikman, J.*

AIKMAN. J.—The appellant is a lady residing in the Rampur State, that is, out of British India. She brought a suit in the Court of the Subordinate Judge of Moradabad to recover a sum of money on account of her dower. The suit was based on a judgment which she had obtained from a Court in Rampur against her husband, the respondent, Abdul Latif Khan. Her suit was dismissed. She appealed. On the application of the respondent she was, on the 3rd November 1906, ordered by the appellate Court to furnish security for costs, under the provisions of section 549 of the Code of Civil Procedure. The 15th of December 1906 was the time fixed within which the security had to be furnished. The appellant did not furnish the security within that time. On the 19th of December 1906 she asked for an extension of time within which to file the security. Although the time had expired, the learned Judge had authority to extend the time [vide the decision of the Privy Council, in *Badri Narain v. Sheo Kuer*. (1)]. Unfortunately, for the appellant, the learned Judge refused to extend the time. He sets out in his order, of the 19th December 1906, that the appellant had been allowed six weeks within which to furnish security. This he considered ample time, and he remarks that no attempt was made to have had that time extended, meaning clearly, no attempt within the time allowed. He adds "I see no sufficient reason for allowing this application or for extending the time allowed and consequently refuse the application."

On the following day he rejected the appeal under the provisions of section 549 of the Code of Civil Procedure. On the 15th of February the appellant presented another petition asking to be allowed to deposit security and that the appeal might be restored to its original number. In support of her

(1) [1890] L. R., 17 I. A., 1.

application she relied on a decision of the Privy Council, in *Kuer Balwant Singh v. Kuer Daulat Singh* <sup>(2)</sup>. The learned Judge held that that case was very different from the one with which he had to deal and refused to restore the appeal. It is against that order that the present appeal has been preferred. For the respondents a preliminary objection is raised that no appeal lies. It is noticeable that there is no provision in the Code similar to that contained in the second paragraph of section 381 which allows a plaintiff, whose suit has been dismissed for failure to furnish security for costs, to apply for an order to set the dismissal aside. Nor can we find in the Code any right of appeal given from an order refusing to readmit an appeal under the circumstances set forth above. In reply to the preliminary objection the learned Vakil for the appellant relies on the Privy Council decision cited above. The facts of that case were of a peculiar nature and in our opinion the learned Judge is right in holding that it is distinguishable from the present case. We were compelled, therefore, to sustain the preliminary objection. At the same time we take the opportunity of expressing our opinion that considering the serious consequences entailed by an order under section 549, it would be well if the legislature should consider whether it is not advisable to embody in the new Code of Civil Procedure some provisions analogous to that contained in the second paragraph of section 381, and to give a right of appeal from orders passed under section 549, but as the law at present stands we can find no provision in it under which this appeal can be brought. We may mention that a Full Bench of this Court held in *Lekha v. Bhauna* <sup>(3)</sup> that an order rejecting an appeal under section 549 is not appealable, either as an order or as a decree. The case may be a hard one, but under the circumstances we have no alternative but to sustain the respondent's preliminary objection and dismiss the appeal which we hereby do. Under the circumstances of the case we make no order as to costs.

X

*Appeal dismissed.*

(2) [1886] L. R., 13 I. A., 57.

(3) [1895] I. L. R., 18 All., 101

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CIVIL

1908.

January 4,

STANLEY, C. J.  
BURKITT, J.

TEJPAL

*versus*

GIRDHARI LAL.\*

*Mortgage—unregistered deed—sale of the property hypothecated—Purchaser having notice of the mortgage—Property preempted by the defendant—whether notice to preemptor.*

A right of pre-emption is not a right of re-purchase but is simply a right entitling the preemptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derives his title. He can only get what the vendee bargained for.

Where, therefore, a vendee purchases with notice of a prior unregistered encumbrance and the property is preempted, the preemptor takes subject to that mortgage even if the existence of that mortgage was concealed from him.

SECOND APPEAL from a decree of A. Rahman, Esq., Subordinate Judge of Mainpuri, modifying a decree of Babu Gokul Prasad, officiating Munsif of Shikohabad.

Suit for sale upon a mortgage.

The material facts appear from the judgment.

*J. N. Chaudri*, for the appellant.

*Baldeo Ram Dave*, for the respondents.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The suit out of which this appeal has arisen was brought by the plaintiff to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900 by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95, and therefore the mortgage was not compulsarily registerable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bharach, the mortgagor, to Bhagwan Singh, Karan Singh and Tota Ram, and the purchase deed, in their favour, was duly registered. At the date of the sale, the purchasers had notice of the unregistered mortgage, and therefore, must be taken to have purchased the property subject to it. Subsequently the defendant respondent, Girdhari Lal, claimed a right to preempt this sale and succeeded in his claim and obtained

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possession of the property. The plaintiff then brought his suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption, he had no notice of the plaintiff's mortgage, and therefore was not bound by it. The learned Munsif held that the defendant appellant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal, the learned Subordinate Judge reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had, that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt.

From this decision, the appeal now before us was preferred. On behalf of the respondent reliance was placed upon S. 50 of the Registration Act, which provides that every document of the kinds mentioned in clauses (a), (b), (c) and (d) of S. 17, which include a deed of sale, shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered document, relating to the same property and not being a decree or order. This section, it has been frequently held, does not protect a purchaser who purchased with knowledge of an unregistered incumbrance. Therefore it is clear that the vendees Bhagwan Singh, Tota Ram and Karan Singh were liable to satisfy Tejpal's mortgage. They, in fact, must be taken to have purchased the property subject to the mortgage.

The question then is, is the pre-emptor Girdhari Lal in any better position than the vendees? We think not, and for this reason. A right of pre-emption is not a right of repurchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale, under which he derives his title. A person, who chooses to pre-empt, therefore, must take upon him the burden of the obligations subject to which the sale was made, as well as the benefits accruing therefrom. In other words, he can get no more than that for which the vendee bargained. The vendees in this case acquired the property subject to the plaintiff's mortgage, and the pre-emptor, if he chooses to pre-empt, must

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also take subject to it. The pre-emptive property was not in fact an unencumbered property, but one subject to the plaintiff's mortgage, an incumbrance which the purchasers were liable to satisfy and which the pre-emptor, who has enforced the right to have his name substituted as purchaser, must we think satisfy. The vendees had distinct notice of the incumbrance, and even if they concealed their knowledge of it from the pre-emptor they cannot thereby give him a better right than that which they themselves possessed. The question may be looked at from another point of view. The consideration, for the sale to the vendees, was not alone the money actually paid in cash, but also the amount of the mortgage, for the payment of which they became responsible. In holding therefore that the pre-emptor is bound to satisfy the mortgage debt we simply require him as a pre-emptor to pay the entire of the purchase money. It is well settled law in this court that a pre-emptor must pre-empt the whole of the bargain between vendor and vendee or not at all. He cannot take a portion of it only. Here part of the bargain was that the vendees should accept the liability of the vendor, in respect of the plaintiff's mortgage. Therefore the successful pre-emptor took subject to that liability.

For these reasons, we think that the lower appellate Court was wrong in reversing the decision of the learned Munsif. We therefore allow the appeal set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance with costs in all courts. We extend the time for payment of the mortgage debt up to the 1st of April next.

*Appeal decreed.*

## MURLI SINGH

versus

## JAI SINGH AND ANOTHER.\*

*Hindu Law—Inheritance—Incurable disease—Virulent type—Contracting disease after inheritance, effect of.*

A Hindu is not divested of an estate if after inheriting it, he contracts an incurable disease. It is only cases of virulent and aggravated type of an incurable disease that cause inability to inherit.

SECOND APPEAL against the decree of Babu Khetra Mohan Ghose, Additional District Judge of Aligarh, confirming a decree of Babu Daya Nath, Munsif.

Suit for sale upon a mortgage.

Ganga Ram mortgaged the property in dispute to the plaintiffs, who brought this suit against his son after his death. The defendant pleaded that his father was a leper and had no right to the property and therefore the mortgage was invalid.

The courts below decreed the suit.

Defendant appealed.

*Gulzari Lal*, for the appellant, submitted that Ganga Ram having been found to be a leper at the date of the mortgage, had no right in the property, and was not competent to execute the mortgage. He was not entitled to a share in the ancestral family property. He relied on

*Janardhan v. Gopal Pandurang*, 5 Bom., H. C. R. A. C., 145.

*Ram Sahye Dhukkut v. Lalla Lajee Sahye*, [1881] I. L. R., 8 Cal., 149.

The respondents were not represented.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal from a decree of the Additional District Judge of Aligarh, affirming a decree of the Munsif of Bulandshahar. The suit, out of which this appeal arises, was brought to recover money secured by a mortgage,

\* S. A. 365 of 1906.

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executed by one Ganga Ram, father of the defendant, Murli Singh, on the 2nd March 1899. Ganga Ram is dead, and the suit is brought against his son, Murli Singh, and the widow of Ganga Ram. Amongst other defences to the suit, a plea was put forward by Murli Singh to the effect that Ganga Ram, executant of the bond had become a leper, during his father's life-time and consequently did not acquire any rights in the property mortgaged. The courts below have found that Ganga Ram did not become a leper, during his father's life-time and consequently did not acquire any right in the property mortgaged. The court below found that Ganga Ram did not become a leper, until after his father's death, and a decree was passed in favour of the plaintiffs. Murli Singh comes here in second appeal. The only ground urged before us is that when Ganga Ram became a leper after his father's death, he thereby lost all rights in the property, he had mortgaged. No plea to this effect is put forward in the written statement. Although this plea is one of those to be found in the memorandum of appeal to the lower court, it does not appear to have been urged in that court, as it is not touched in the judgment.

In our opinion this plea cannot succeed. In the first place there is no allegation in the written statement as to the nature of leprosy from which Ganga Ram suffered. The plea is based on the quotation from *Yajnavalkya* to be found in chapter II section 10 *placitum* 1 of the *Mitakshara*. There it is said, in dealing with the subject of exclusion from inheritance, that "a person afflicted with an incurable disease, as well as others similarly disqualified, must be maintained excluding them, however, from participation." As remarked by Mayne (Hindu Law 7th Ed., para 595) "Some cases of leprosy are of a mild and curable form whilst others are of a virulent and aggravated type and incurable. It is only the latter form of malady which causes inability to inherit". Now in the first place, there was no allegation in the written statement that the leprosy from which Ganga Ram suffered was of a virulent and incurable type. In the next place, we have not been referred to any authority which would justify us in holding that a Hindu, after succeeding to an estate, is divested of this

estate by contracting an incurable disease, and in the absence of any such authority, we decline to hold that this is the law.

The other grounds, in the memorandum of appeal to this Court, were not argued. The result is that we dismiss the appeal but without costs as the respondents are not represented.

G. L.

*Appeal dismissed.*

## ABDUL RASHID

*versus*

## ABDUL LATIF.\*

*Res judicata—Code of Civil Procedure (Act XIV of 1882), section 13, explanation 2—Agra Tenancy Act (II of 1901), sections 164, 165—suit for profits—Mode of collection.*

A suit for profits by one co-sharer against another was dismissed in 1905 by the Assistant Collector as barred by the rule of *res judicata*. This decision was reversed by the District Judge who remanded the case under section 562, Code of Civil Procedure. The decision of the District Judge was affirmed on appeal by the High Court. In second appeal, after remand, the plea of *res judicata* was again put forward, based upon certain decisions of the High Court, barring a second appeal in case of remand, under section 562, Code of Civil Procedure, under the Tenancy Act, and also based upon two other decisions between the same parties which had not been set up on the previous occasion. *Held*, that the decision of the District Judge became final and its effect was not nullified by the decisions subsequently passed as to the right of appeal. As to the other decisions, they not having been relied upon before the District Judge as a ground of defence, could not be now set up under explanation 2 of section 13, Code of Civil Procedure. The appellant not only might but ought to have relied upon those decisions in the previous litigation.

In a suit under section 164 of the Tenancy Act, only the actual collections, made by the defendant, are to be taken into account in determining the amount of profits due. In a suit like the present, a plaintiff is not entitled to have profits calculated on what might have been collected or on the rates paid by tenants in other *kheuwats*, for lands of the same kind. This constitutes the distinction between a suit of this nature and one under section 165, Tenancy Act.

SECOND APPEAL from a decree of A. Kendall Esq., Additional District Judge of Meerut, modifying a decree of the M. Maqsud Ali Khan Assistant Collector first class.

\* S. A. 977 of 1906.

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*A. E. Ryves* (with him *Muhammad Ishaq* and *Rahmat-ullah*), for the appellant.

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*Abdul Raoof*, for the respondent.

The judgment of the Court was delivered by

*Aikman, J.*

AIKMAN, J.—This appeal arises out of a suit brought by one co-sharer against another under the provisions of section 165 of the Agra Tenancy Act to recover a share of profits on account of the years 1307, 1308 and 1309 *Fasli*. The plaintiff claimed a sum of Rs. 1292-9-4, on account of profits for the years in suit. The Assistant Collector passed a decree for Rs. 194-13-7 without interest. Both parties appealed. The appeal of the defendant was dismissed. On the plaintiff's appeal, the learned Additional Judge varied the decree of the first court by allowing the plaintiff Rs. 908, on account of profits for the years in suit, together with interest at the rate of twelve per cent per annum, on the amount decreed up to the date of suit, and future interest at six per cent. The defendant comes here in second appeal. It appears that this suit which was filed so long ago, as the 26th January 1903, was at first dismissed by the Assistant Collector on a plea of *res judicata*. On appeal, the learned District Judge reversed the decision of the first court, and remanded the case for trial on the merits, under the provisions of section 562 of the Code of Civil Procedure. Against the order of remand, an appeal was preferred to this court. This appeal was disposed of by a Bench of two judges, on the 8th of April 1905, the order of the District Judge being confirmed. In the present appeal, the defendant again put forward the same plea of *res judicata*, which had been previously overruled. The learned counsel for the appellant contends that as it has been held in the case of *Wilayet Hussain v. Maharaja Manindra Chandra Nundy*,<sup>(1)</sup> and in a subsequent case *Zahur Ali v. Sher Ali*,<sup>(2)</sup> that no appeal lies from an order of an appellate court in a suit, under the Agra Tenancy Act, remanding a case for trial on the merits, the decision of this Court of the 8th of April 1905 was *ultra vires* and should be

(1) [1905] A. W. N. 198.

(2) [1906] A. W. N. 5.

ignored. We cannot accept this contention. That decision became final and in our opinion its effect is not nullified by the decisions subsequently passed as to the right of appeal. For the appellant, reliance is also placed on two other decisions which it is contended, bar the present suit by the principle of *res judicata*. These other decisions were not relied upon as a ground of defence when the case was last before the District Judge and this Court. In our opinion, we ought not to allow the appellant to put them forward now. In our judgment, the appellant not only might but ought to have relied upon these decisions in the previous litigation. We hold that the principle of explanation 2 of section 13 of the Code of Civil Procedure is applicable. We are of opinion, then, in regard to the first plea in the memorandum of appeal that the suit is not barred by the principle of *res judicata*.

The second ground in the memorandum of appeal here was not argued. The next plea urged before us is that the lower appellate court was wrong in calculating profits at an arbitrary rate of rent, which was neither according to the recorded rate of rent nor the actual collections made by the defendant. In our opinion, this plea must be sustained. We think the court of first instance was right in holding that in a suit of this nature, only the actual collections made by the defendant, are to be taken into account, in determining the amount of profits due. The suit, as said at the outset, is under section 165 of the Tenancy Act, and it will be noted that this section contains no provision similar to that which is found in sub-section 2 of section 165, which deals with the case of a suit, brought by a co-sharer against a *lambardar* for profits. The plaintiff alleged that the rent, recorded in the village papers, was fictitious, and he based his claim "on the average rate of rent paid by tenants to other *samindars* for lands of the same kind and quality." In our opinion, in a suit like the present, a plaintiff is not entitled to have profits calculated on what might have been collected or on the rates paid by tenants in other *khewats* for lands of the same kind. The plaintiff, at the end of para. 3 in his plaint, asserted that the defendant had collected rent at these prevailing rates. Had he proved this, the decree of the lower appellate court could not have been assailed, but no attempt was made by the plain-

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tiff either by putting the defendant into the witness-box or by calling tenants to prove what they had actually paid, to show that the defendant had realized any more than the amounts recorded in the village papers. The learned Counsel for the respondent asked us to send back the case to the court below to give the plaintiff an opportunity of proving what the actual collections were. This we are not prepared to do. It is not shown that any evidence, which the plaintiff wished to adduce, was shut out, and he ought to have come to court prepared to prove his allegation that the defendant had collected rent at the rates, which the plaintiff asserts to be the prevailing rates. We think the learned Additional Judge was wrong in allowing the plaintiff profits, calculated on a mere assumption, and as his judgment shows, in an arbitrary manner. We think therefore this plea must be sustained, and we find that the plaintiff is only entitled to the amount of profits, found due by the Assistant Collector.

The third plea argued before us is that the learned Additional Judge was wrong in allowing interest to the plaintiff. So far as the decree of the court below awards interest from the date of the institution of the suit, we think it was acting within its jurisdiction, but the same is not the case with regard to interest, which has been awarded on the principal sum adjudged prior to the date of suit. If the plaintiff wanted such interest, he ought to have asked for it in the plaint, and stamped his plaint accordingly. This, as the court of first instance points out, the plaintiff omitted to do. The result is that we so far allow the appeal as to decree in plaintiff's favour for a sum of Rs. 194-13-7, with interest from the date of institution of suit until realization at the rate of six per cent per annum. *Quoad ultra*, the appeal is dismissed. The parties will pay and receive costs here and in the court below, in proportion to their failure and success. The costs of this court will include fees on the higher scale.

*Decree modified.*

KISHAN LAL

versus

UMRAO SINGH.\*

*Transfer of Property Act (IV of 1882), section 99—Sale held in contravention of—Notice to judgment-debtor—Application to set aside—after confirmation.*

A property, subject to a mortgage, cannot be sold in execution of a simple money decree held by the mortgagee, even where he disclaims all his interests under the mortgage, and obtains a simple money decree. *Madho Prasad v. Baijnath*, A. W. N., for 1905, p. 152, referred to. But where a property has been sold after notice to the mortgagor, in execution of a simple money decree held by the mortgagee and the sale is confirmed, the mortgagor cannot go behind the order for sale and seek to have it set aside on the ground that it was held in contravention of section 99 of the Transfer of Property Act. *Madan Makund Lal v. Jamna Kaulapuri*, 2 A. L. J. R., 123, followed. After the sale is confirmed, as between the auction purchasers and the judgment-debtors, the title of the former becomes complete and it is not open to the judgment-debtor or his representatives to question the title of the auction purchaser.

APPEAL against the order of remand by Babu Khetra Mohan Ghose, Additional District Judge of Aligarh, reversing the decree of Babu Kameshwar Nath, Munsif of Kasganj.

The facts of the case were as follows :—The decree-holder brought a suit for sale upon a mortgage. During the pendency of that suit, he abandoned his rights under the mortgage and obtained a decree for money, and in execution of that decree attached and sold the property mortgaged. Before the sale, the judgment-debtor applied for postponement, but his application was refused. After the sale, he applied to set it aside under section 311, but his application was rejected. After the sale was confirmed, he applied to set it aside, as it was held in contravention of section 99 of the Transfer of Property Act. The Court of first instance rejected the application, but the lower appellate court reversed the decree and remanded the case.

The decree-holder appealed.

*Sarat Chandra Chaudhri* (for *Satish Chandra Banerji* with him *Gulzari Lal*), for the appellant. There are three points

\* F. A. F. O. No. 22 of 1907.

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raised. I. The judgment-debtor, having refrained from objecting to the validity of the sale after service of notice on him, is precluded from re-opening the question after the sale has taken place. The principle of section 13, Expl. II, Code of Civil Procedure, has been held to apply to execution proceedings.

*Behari Singh v. Mukat Singh*, [1905] I. L. R., 27 All., 273.

II. A sale, held in contravention of the provisions of section 99, Transfer of Property Act, is voidable, and if confirmed, it cannot be impugned by the judgment-debtor.

*Abdul Rashid v. Dilsukh Rai*, [1905] I. L. R., 27 All., 517.

*Mangli Prasad v. Pati Ram*, [1904] 1 A. L. J. R., 360.

*Madan Makund Lal v. Jamnu Kaulapuri*, [1898] 2 A. L. J. R., 123.

*Raj Kishore Dey Sarkar v. Dina Nath Chandra*, [1907] 12 C. W. N., lx.

III. The Munsif having decided that the sale could not be set aside, and the appellate court having reversed him, the order of remand is futile, because the sale may have been set aside by the judge himself.

*Tej Bahadur Sapru*, for the respondent. The judgment-debtor may have objected to the sale taking place before the sale, but there is no duty cast on him by law to do so. The occasion for objecting that the sale was bad under section 99, Transfer of Property Act, arises when the sale has been confirmed. The judgment-debtor is under no obligation to warn the decree-holder against the consequences of the latter's own act. The cases cited are distinguishable. I rely on

*Sona Singh v. Behari Singh*, [1905] I. L. R., 33 Cal., 283.

*Martand v. Dhondo*, [1897] I. L. R., 22 Bom., 624, 628.

To allow the decree-holder to get out of the provisions of section 99, those provisions being imperative, would be to countenance the evil against which that section is directed : it curtails the mortgagee's powers :

*Govind v. Parasram*, [1900] I. L. R., 25 Bom., 161, 167.

*Sarat Chandra Chaudhri*, in reply, cited

*Umed v. Jas Rao*, [1907] A. W. N., 193.

*Thaleri Pathumma v. Thandora Mammad*, [1899] 10 M. L. J. R., 110.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal from an order of remand made by the learned Additional Judge of Aligarh in execution proceedings. The respondent, Umrao Singh, on the 13th of November 1895, mortgaged certain property to one Kishan Lal. The mortgagee brought a suit against the respondent. In that suit, he abandoned his rights under the mortgage, and obtained a simple money decree, on the 25th of March 1901. This decree he assigned to the present appellant, who applied on the 22nd of November 1902, for attachment and sale of the property, which had been mortgaged to his assignor. The property was attached, and a proclamation of sale issued under section 287 of the Code of Civil Procedure. On the 18th of April 1903, the judgment-debtor asked for postponement of the sale, in order that he might raise the amount of the decree. This application was refused. On the 20th of July 1903, the property was sold and purchased by the present appellant. On the 19th of August 1903, the respondent, judgment-debtor applied, under section 311 of the Code of Civil Procedure, to have the sale set aside. On the 12th of September 1903, this application was rejected, and on the 22nd of that month, the sale was confirmed. It appears from the record that a sale certificate was granted to the appellant who is now in possession. On the 6th of June 1906, nearly three years after the sale, the judgment-debtor applied to the court to set aside the sale on the ground of its having been held in contravention of the provisions of section 99 of the Transfer of Property Act. The court of first instance disallowed this application, on the ground that it was too late. On appeal by the judgment-debtor, the lower appellate court reversed the decision of the Munsif, and remanded the case to the court of first instance, under section 562 of the Code of Civil Procedure for decision on the merits. We may remark here that we see no reason whatever why the court below should have sent back the case, as by its decision the only question between the parties had been determined. The appeal here has been very ably argued by the learned gentlemen, who appear for the parties. They have cited a large number of authorities. It has been held by this Court, in the case of *Madho Prasad Singh v. Baijnath* <sup>(1)</sup>, that even though the

(1) [1905] A. W. N., 152.

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mortgagee disclaims all interests in his mortgage, and asks for and obtains a simple money decree, he is precluded by section 99 of the Transfer of Property Act, from bringing that property to sale in execution of the simple money decree. Having regard to that ruling, it must be held, therefore, that the court was not justified in ordering the sale of the property, but the fact remains that it did order the property to be sold, that the sale took place and was confirmed, and that a certificate was granted to the auction purchaser, which by operation of section 316 of the Code of Civil Procedure, so far as the parties to the suit and the persons claiming through or under them, vests in the purchaser the title to the property sold. What we have to decide is whether the order for sale having been passed to the knowledge of the judgment-debtor, and having been allowed by him to become final, he can now at this late stage have the sale set aside and the purchaser divested of his title, on the ground that the court ought not to have ordered the property to be sold. In our opinion the decision of the court of first instance on this question is right. In the case of *Madan Makund Lal v. Jamna Kaulapuri* (2) the learned Judges remark in regard to a somewhat similar case, "the plaintiff relied on the provisions of section 99 of the Transfer of Property Act. No doubt the sale was held in violation of the provisions of that section, but it was the duty of the judgment-debtors, whom the plaintiff now represents, to object to the sale or to the confirmation of the sale before the sale was confirmed. After the sale had been confirmed, as between the judgment-debtors and the auction purchasers, the title of the latter has become complete and it is no longer open to the plaintiff, who stands in the shoes of the judgment-debtors, to question the title of the defendant, on the ground that the sale at which they purchased was not authorised by law." It is true that, that was a case of a suit while this was an application under section 244 of the Code of Civil Procedure, but we do not think that this circumstance affects the principle laid down in the passage just cited. The decision in *Raj Kishore Dey Sarkar v. Dina Nath Chander* (3), is also in favour of the appellant. In the case of *Thaleri Pathumma v. Thandora Mammad* (4), it was held by SHEPPARD

(2) [1905] 2 A. L. J. R. 123.

(3) [1908] 72 C. W. N., LX.

(4) [1899] 10 M. L. J., 110.

and BENSON, JJ., that when an order for sale of a mortgaged property, in execution of a money decree of the mortgagee, was obtained after notice to the mortgagor and the property was sold in pursuance of such order, the mortgagor cannot go behind the order and seek to set aside the sale on the ground that it ought not to have been passed by reason of section 99 of the Transfer of Property Act. In the case of *Durga Charan Mandal v. Kali Prasanno Sarkar* <sup>(5)</sup>, a judgment-debtor, whose occupancy holding had been sold in execution of a decree for rent, objected to the application made by the auction purchaser after the confirmation of sale for delivery of possession on the ground that the sale was illegal. The learned Judges, who decided that case, GHOSE and BANERJI, J.J., observe at page 732 of the judgment, "An order for sale was made and in furtherance of that order, the property was sold whatever may be the effect of that sale. If the judgment-debtors were parties to that order, or were aware of it, and did not appeal against it, they are now precluded from questioning the propriety of that order and consequently of the sale that has taken place under that order". The decision, by one of us, in *Umed v. Jasrao* <sup>(6)</sup>, is also in favour of the appellant. In the case *Sonu Singh v. Behari Singh* <sup>(7)</sup>, the learned Judges say, "As regards the mortgagor raising no objection before the sale, it must be observed that no duty was imposed upon him to do so, it being the decree-holder alone, who was responsible for the particulars to be entered in the sale proclamation." It appears that in that case, the application to set aside the sale was made before confirmation, though this circumstance is not referred to in the judgment. The observation just cited is opposed to the authorities to which we have referred above and, with all deference to the learned Judges, we are unable to accept the view expressed by them. We entirely disagree with the view expressed by the learned Additional Judge in this case that the respondent could not object until the sale had actually taken place. The learned Additional Judge is also wrong in saying that no specification of the property was given in the proclamation for sale. That document sufficiently defines the property which the decree-holder wished to sell

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(5) [1898] I. L. R., 26 Cal., 727. (6) [1907] A. W. N., 193

(7) [1905] I. L. R., 33 Cal., 383.

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and if there was any irregularity in publishing the sale that was a matter to be dealt with under section 311 of the Code of Civil Procedure. Following the authorities cited in the earlier part of this judgment, we are of opinion that this appeal must succeed. We set aside the order of the Court below and restore that of the Court of first instance. The appellant will have his costs here and in the lower appellate court.

S. C. C.

*Appeal decreed.*

[See also *Ashutosh Sikdar v. Behari Lal Kirtania*, I. L. R., 35 Cal., 61.—Ed].

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BANERJI, J.  
AIKMAN, J.

## IN THE MATTER OF AHSAN ALI.\*

*Legal Practitioners' Act (XVIII of 1879), section 13—compromise by client.*

A legal practitioner, who believing himself to be under a pecuniary liability to his client, endeavours to get the client to accept a less amount than that for which he is liable is not guilty of "grossly improper conduct in the discharge of his professional duty" within the meaning of section 13 of the Legal Practitioners' Act.

Reference by F. D. Simpson Esq., District Judge Gorakhpur, with a recommendation that Ahsan Ali's name be struck off the rolls of the court.

*Sir Walter Colvin*, for the pleader.

The judgment of the Court was delivered by

AIKMAN, J.—This case has been reported to us under the provisions of section 14 of "the Legal Practitioners Act 1879" by the learned District Judge of Gorakhpur with the recommendation that a pleader named Ahsan Ali be dismissed on the ground that he has been guilty of grossly improper conduct in the discharge of his professional duty. The pleader has been suspended from practice pending the orders of this Court.

It appears that in a pre-emption suit the plaintiff Gobind Saran got a decree on condition of paying to the defendant Ram Dhani the sum of Rs. 2190-8-0. The money was paid into Court. It was withdrawn on the 17th May last by Ahsan Ali, acting as vakil on behalf of an impostor who personated Ram Dhani and who has not yet been traced. When the fraud

\* Mis. 392 of 1907.

came to light in the July following, a criminal prosecution was instituted against Ahsan Ali and he was committed to the Court of Session, on charges of cheating and dishonestly using as genuine the forged *vakalatnama* upon which the money was paid over to him. The result of the trial was that he was acquitted, the learned Judge considering it possible that he himself had been deceived, and that it was not proved that he had acted dishonestly. After the conclusion of the trial, proceedings were instituted against Ahsan Ali under the Legal Practitioners' Act.

It appears that when the fraud was discovered, Ahsan Ali offered Ram Dhani Rs. 1400 to compound the matter. This offer Ram Dhani agreed to accept. But Ahsan Ali was unable to raise this sum and then Ram Dhani brought the matter to the notice of the court.

The learned Judge says in regard to Ahsan Ali. "He offered advice to his client which he knew would cause serious pecuniary loss to him, and he did so for the sole purpose of escaping the legal liability he had incurred by his own carelessness. Such conduct is grossly improper in a legal practitioner."

This is a view which we are not prepared to accept.

In our opinion a legal practitioner, who, believing himself to be under a pecuniary liability to his client, endeavours to get the client to accept a less amount than that for which he is liable cannot be held guilty of "grossly improper conduct in the discharge of his professional duty" within the meaning of section 13 of the Act. Undoubtedly Ahsan Ali, when he learnt that a gross fraud had been practised on the court, ought at once to have brought the matter to the notice of the court. But his neglect to do so is not made the subject of a charge against him.

If, as the learned Judge says, the other vakils, when the fraud was brought to their notice endeavoured from a "misplaced *esprit de corps*" (to use the judge's expression) to hush it up, their action was reprehensible.

We are of opinion on the materials before us that Ahsan Ali must be acquitted of the charge brought against him. We therefore direct that his certificate be returned to him.

*Recommendation not accepted.*

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## AHMAD ULLAH KHAN

versus

MURLI AND ANOTHER.\*

*Agra Tenancy Act (II of 1901), section 177, Sch. IV, (group A.)—Second appeal to District Judge—Proprietary title, question of.*

When a person, against whom a suit for arrears of rent is brought, only pleads that the relation of landlord and tenant does not subsist between him and the plaintiff, and the Assistant Collector and the Collector decide against him, no second appeal lies to the District Judge inasmuch as no question of proprietary title is involved in the case. *Dalchand v. Shamlu*, A. W. N., 1905, p. 46, and *Chittar Singh v. Rup Singh*, A. W. N., 1906, p. 247, distinguished.

APPLICATION to revise a decree of Babu Khettar Mohan Ghose, Additional Judge of Aligarh, reversing a decree of Pandit Jwala Prasad, Collector of Etah.

Suit for arrears of rent.

The facts of the case and the argument sufficiently appear from the judgment.

*B. E. O'Connor*, for the applicant.

*Jang Bahadur Lal* (for *Gokul Prasad*), for the opposite party.

The following judgment was delivered by

*Karamat Husain, J.* KARAMAT HUSAIN, J.—This is an application under section 622 of the Code of Civil Procedure, read with section 193 of the North Western Provinces Tenancy Act (No. II of 1901) asking this Court to set aside a decree passed by the learned Additional District Judge of Aligarh.

The facts are as follows:—

One Ahmadullah Khan brought a suit for the arrears of rent of plot No. 2609, under section 102 of the Tenancy Act. One of the pleas in defence was that the relation of landlord and tenant did not exist between the parties, and that the defendants were sub-tenants of Ganga Bux, and Shib Bux, tenants-in-chief. The court of first instance (Assistant Col-

\* Civil Revision No. 66 of 1907.

lector of the 2nd class) dismissed the suit, on the ground that the relation of landlord and tenant did not exist between the parties. The plaintiff appealed to the Collector who, finding that such a relation did exist between the parties, reversed the decree of the first court, and gave a decree to the plaintiff. The defendants preferred a second appeal to the District Judge of Aligarh.

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*Karamat Husain, J.*

That appeal came on for hearing before the Additional District Judge, and it was contended that no second appeal lay to him from the appellate decree of the Collector inasmuch as the suit was one of those included in group (A) of the fourth Schedule. The learned Additional District Judge, thinking that a question of proprietary title was in issue in the first appellate court as well as his court, came to the conclusion that a second appeal lay to him and decreed it. The plaintiffs come to this court in revision and urge that as no question of proprietary title arose between the parties, the learned Additional District Judge had no jurisdiction to entertain the appeal. This contention, in my judgment, is sound. One of the pleas in defence, as I have already stated, was that the relation of landlord and tenant did not exist between the parties, and it is evident that the determination of that point, in no way, involved the question of proprietary title of either party to the plot for the rent of which the suit was brought. In support of the view taken by the learned Additional District Judge, reliance is placed on *Dalchand v. Shamla* <sup>(1)</sup>, and *Chhitar Singh v. Rup Singh* <sup>(2)</sup>. The facts of those cases were, however, different from the facts of the case before me. In *Dalchand v. Shamla*, the tenant pleaded that his father Dalchand was the proprietor of the land for the rent of which the suit was brought, and that by virtue of that proprietorship, he (the tenant) held possession of the land. In these circumstances, it was held that a question of a proprietary title was in issue. In the case of *Chhitar Singh v. Rup Singh*, the sub-tenant pleaded that he was not a tenant of the plaintiffs, but that he himself was the principal tenant; that the plaintiffs had no right to the land in question; and that under an award, the defendant was in

(1) [1905] A. W. N., 46 S. C., 2 A. L. J. R., 176.

(2) [1906] A. W. N., 247 S. C., 3 A. L. J. R., 603.

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*Karamat Husain, J.*

proprietary possession of the land, and it was held that a question of proprietary title was raised between the parties. In the case before me, no question of proprietary title is involved. The tenants simply aver that the relation of landlord and tenant does not exist between the parties. They do not deny the proprietary title of the plaintiff to the plot for the rent of which he had brought the suit, nor do they claim any proprietary title to the plot for themselves.

I, therefore, hold that the learned Additional District Judge had no jurisdiction to entertain the appeal, and setting aside his decree restore that of the Collector with costs.

*Decree set aside.*

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1908.

February 7.

STANLEY, C. J.  
BURKITT, J.

NARPAT

versus

RAM SARAN DAS.\*

*Transfer of Property Act (IV of 1882), section 68 (c)—Right of usufructuary mortgagee to recover mortgage money by sale of mortgaged property—*

Where usufructuary mortgage deed provided for the recovery of the amount due "from the mortgaged property" the court granted a decree for sale of the property where the mortgagee, being dispossessed of the mortgaged property sued for recovery of the mortgage money. *Jafar Husen v. Ranjit Singh*, I. L. R., 21 All., 4; *Kashi Ram v. Sardar Singh* A. W. N. 1905 p. 226, referred to

SECOND APPEAL against the decree of Maulvi Muhammad Ahmad Ali Khan, Additional Judge of Meerut, setting aside the decree of Babu Ram Chander Chaudhri, Additional Munsif of Meerut.

The appellants mortgaged with possession certain properties to the respondent and the mortgagee covenanted that in case he "does not deliver possession of the mortgaged property or claims *sir* lands or in case the whole or a part of the mortgaged property passes out of the possession of the mortgagee, the mortgagee shall be entitled to recover his money with interest at Rs. 2 per cent per mensem from me and the mortgaged property." The respondent, alleging that possession was not delivered to him by the mortgagor of the mortgaged property, sued for the recovery of the mortgage money by sale of the mortgaged property.

\* S. A. No. 4 of 1906.

The court of first instance finding that the mortgagee was in possession of the mortgaged property dismissed the suit. The lower appellate court decreed the claim as prayed holding that the mortgagee was not put in possession of the mortgaged property.

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v.

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Stanley, C. J.

Defendant appealed.

*Gulzari Lal*, for the appellant, contended that the plaintiff was not entitled to a decree for sale, under section 88 of the Transfer of Property Act. Decree under section 68 of the Act can be a personal decree only. He relied on

*Hira Lal v. Ghasitu*, [1894] I. L. R., 16 All., 318.

The following authorities were also referred to in the course of the argument.

*Jafar Husain v. Ranjit Singh*, [1898] I. L. R., 21 All., 4.

*Kashi Ram v. Sardar Singh*, [1905] A. W. N., 226.

*Baldev Ram Dave* (for *Sundar Lal*), for the respondent, was not called upon.

The judgment of the Court was delivered by

STANLEY, C. J.—We are of opinion that the learned District Judge rightly decided the appeal before him. From a perusal of the mortgage, which has given rise to this suit, it appears to us that the only reasonable inference to be drawn from it is that the intention of the parties was to provide for the realisation of the mortgage-debt from the property itself and not merely from its usufruct. The deed in fact was of the nature of a simple mortgage, as well as of a usufructuary mortgage. The case in fact resembles more that of *Jafar Husen, v. Ranjit Singh* <sup>(1)</sup> than that of *Kashi Ram v. Sardar Singh* <sup>(2)</sup>. In the first mentioned of these cases, the court came to the conclusion that the intention of the parties was that the debt was realisable by sale of the mortgaged property, whereas in the other case, this Bench was of opinion that the mortgage in suit was merely a usufructuary mortgage. For these reasons, we dismiss the appeal with costs including fees in this court on the higher scale.

D.

*Appeal dismissed.*

(1) [1898] I. L. R., 21 All., 4

(2) [1905] A. W. N., 226.

CIVIL.

1908

Jan. 29.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

MAKUND RAO

versus

JANKI BAI AND ANOTHER.

*Bundelkhand Encumbered Estates Act (1 of 1903), Local—section 12—  
Joint decree—some judgment-debtors taking the benefit of the Act,  
discharged—Liability of the remaining judgment-debtors.*

Judgment debt is a private debt within the meaning of section 12 of the Bundelkhand Encumbered Estates Act. Where the holder of a decree against six judgment-debtors, five of whom took the benefit of the Act, failed to put forward his claim before a Special Judge, during the time allowed by law, the judgment-debt must be deemed to have been discharged to the extent of the joint liability of the persons taking the benefit of the Act. The judgment-debtor, who did not take the benefit of the Act, is only liable for his share.

EXECUTION FIRST APPEAL against the decree of Pramatha Nath Banerji Esq., Subordinate Judge of Jhansi.

The facts of this case are as follows:—Musammat Lachhmi Bai and Musammat Janki Bai held a decree, dated 9th June, 1893, against Baba Atma Ram, Sitaram, Nana Sahib, Balkrishna Bhao Sahib, Raghunath Rao, Krishna Rao and Madho Rao. It appears that on 28th October, 1893, Raja Kesho Rao, the ancestor of the judgment-debtors, who was in possession of the Gurserai Estate, executed a bond for Rs. 30,000, in favour of the decree-holders. The amount of the bond was payable by instalments and the present decree was obtained in respect of some unpaid instalments. All the judgment-debtors excepting Madho Rao sought protection, under the Bundelkhand Encumbered Estates Act, 1 of 1903. The decree-holders appeared before the Special Judge, but after the expiration of four months from the publication of notice under section 8 of the said Act. On 8th July, 1904, the Special Judge rejected the claim of the decree-holders, as being beyond time.

Thereafter the decree-holders applied to recover the entire decretal amount from Madho Rao alone. Madho Rao having died, his minor son, Makund Rao contended that

\* E. F. A., No. 134 of 1906.

as other judgment-debtors had been absolved from all liability for the payment of the decree, he was only liable to the extent of his proportionate share, which was  $\frac{1}{12}$ th in the estate. The Subordinate Judge repelled this contention, and ordered that the whole decretal amount was to be realized from him, as the decree was not divisible.

The judgment-debtor appealed.

*Durga Charan Banerji*, for the appellants, contended that according to section 12 of the Bundelkhand Encumbered Estates Act, the claim, against the judgment-debtors, who had taken advantage of that Act, should be deemed to have been discharged for all purposes and on all occasions. The discharge was equivalent to a payment of their share of the decretal debt. Equity, moreover, was on his side as his client would not, owing to the provisions of the said Act, be able to recover from the other judgment-debtors their share of the decretal debt, in case he was made to pay the whole.

*Madan Mohan Malaviya* (with whom *Iswar Saran*), for the respondents, contended that the decree under execution was a joint decree, and the liability of the judgment-debtors could not be separated. He submitted that his clients were competent to execute the decree against any of the judgment-debtors, they might select. He referred to :—

*Wahed Ali v. Mullick Enayet Hossein*, 12 B. L. R., 500.

He further submitted that execution would not be stopped even if the judgment-debtor proceeded against, showed that he had paid his proportionate part.

He relied on :—

*Salig Ram v. Ram Sewak*, 2 Agra Miscellaneous, 14.

The decree being joint, and no separate liability having been fixed in the decree, no proportionate discharge could be allowed. The execution of the decree depended on the nature of the decree merely and not on extraneous considerations, as for instance, whether the judgment-debtor proceeded against could enforce contribution against his co-judgment-debtors.

*Durga Charan Banerji* was not heard in reply.

The judgment of the Court was delivered by

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MAKUND RAO

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JANKI BAI.

Aikman, J.

AIKMAN, J.—This appeal arises out of an application to execute a decree, dated the 9th of June 1893, which was passed in favour of the respondents, Mussammat Janki Bai and Mussammat Lachmi Bai against six persons, namely, Atma Ram, Sita Ram, Bal Kishen, Raghunath, Krishan and Madho Rao. The appellant here is the son of the last named judgment-debtor. The decree was for the sum of Rs. 5,091-9-0, and for costs and interest. It appears that all the judgment-debtors, save Madho Rao, took the benefit of the Bundelkhand Encumbered Estates Act, 1903. The usual notification was issued calling upon creditors to submit their claims. The respondents, decree-holders put in their claim against the applicants, but, unfortunately for themselves, they did not put forward their claim within the time required by the Act, and the Special Judge refused to consider it. Now there is in the Act a very stringent provision to be found in section 12, which runs as follows:—"Every claim against the proprietor, in respect of a private debt shall, unless made within the time, and in the manner required by this Act, be deemed for all purposes, and on all occasions to have been duly discharged." That the judgment-debt is a private debt within the definition of section 2 of the Act, does not admit of any doubt. It follows from the provisions of section 12 that, so far as the liability of the five judgment-debtors, who took advantage of the Act, is concerned, the decretal debt must be deemed to have been duly discharged. As the respondents, decree-holders could not proceed against the other judgment-debtors, they seek now to recover from the appellant the whole of the judgment-debt. The appellant took objection in the court below, that under the circumstances he was only liable for his proportionate share of the decretal amount. This objection was overruled by the learned Subordinate Judge, who held that the decree being a joint one, each judgment-debtor is liable for the whole of it. This is no doubt true, but we are of opinion that the learned Subordinate Judge did not give due effect to the terms of section 12 of Local Act No. I of 1903 quoted above. No doubt, when a joint decree is passed against several judgment-debtors, the decree may be executed against any one of these judgment-debtors, and if one of them satisfies the whole of the decree, he would have his remedy by

taking proper steps to enforce a right of contribution against his co-judgment-debtors. But even a joint-decree can only be executed for such part of the decretal debt as has not been discharged. In our opinion, the effect of section 12 of the Encumbered Estates Act is to discharge the decree to the extent of the joint liability of the five judgment-debtors, who took advantage of the Act. It appears to us that the respondents cannot treat the provisions of this section as a nullity, and seek to enforce a judgment-debt, which has by the provisions of the law been *pro tanto* duly discharged. If appellant had to satisfy the whole of the debt, we are of opinion he could not enforce any right of contribution against his co-judgment-debtors, as they could rely on the terms of the Act, and plead in answer to a suit for contribution that their share of the judgment-debt must be deemed for all purposes to have been discharged. This result would be owing, not to any fault on the part of the appellant, but to the laches of the respondents, in not having put forward their claim before the Special Judge, within the time allowed by law. We think, therefore, that the order of the court below, disallowing the appellant's objection, was wrong. We allow the appeal and setting aside the order of the court below, remand the case to that court, with directions to proceed with the execution on the basis that the appellant is not liable for the whole of the judgment-debt, but only for his proportionate share thereof. The appellant will recover from the respondent  $\frac{11}{12}$  of the costs, incurred by him in this Court. The respondents will recover from the appellant  $\frac{1}{12}$  of the costs, incurred by them in this Court. The costs in the court below will abide the result.

I. S.

*Appeal decreed.*

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*Aikman, J.*



CIVIL.

1907.

December, 10.

AIKMAN, J.

GOPAL DAS AND ANOTHER

*versus*

MAMMAN KUNWAR.\*

*Pre-emption—Final decree—Date fixed for preferring an appeal not expiring,*

A decree does not become final before the date allowed for preferring an appeal expires. *Sheikh Ewaz v. Mokuna Bibi*, I. L. R., 1 All., 132, and *Rum Sahai v. Gaya*, I. L. R., 7 All., 107, followed.

SECOND APPEAL against the decree of G. A. Paterson, Esq., District Judge of Benares, reversing a decree of Babu Hira Lal Singh, Munsif.

Application to recover possession of pre-empted property.

The material facts appear from the judgment.

*Jang Bahadur Lal* (for *Gokul Prasad*), for the appellants.

*Surendra Nath Sen* (for *G. W. Dillon*), for the respondents.

The following judgment was delivered by

Aikman, J.

AIKMAN, J.—The appellants obtained a decree for pre-emption, conditional on their paying into court a sum of Rs. 200, within one month from the decree becoming final. The plaintiff appealed in regard to the amount of consideration, and the defendants filed objections challenging the plaintiff's right to pre-empt. On the 30th of January 1906, the learned District Judge dismissed both the appeal and the objections. On the 30th of May 1906, the decree-holders paid in the amount fixed by the decree, and claimed to be put in possession. The opposite side contended that the pre-emption money had been deposited beyond time. This contention was overruled by the Munsif, who held that the decree of the appellate court did not become final until the period of appealing therefrom had expired, and that as the money was paid into court within thirty days from the date when the period of filing a second appeal expired, it was within time. The judgment-debtor appealed, and the learned District Judge sustained the appeal

\* E. S. A. No. 430 of 1907.

holding that his decree of the 30th January 1906 was the final decree, as it never was appealed against. The decree-holders come here in second appeal. On their behalf, reliance is placed on the decisions in *Sheikh Ewas v. Mokuna Bibi* (1) and in *Ram Sahai v. Gaya* (2). In these cases, it was held that a decree cannot be regarded as having become final before the date on which the period for preferring an appeal expires. These decisions support the view taken by the first court. I, accordingly, allow this appeal with costs, and setting aside the order of the lower appellate court with costs, I restore the order of the court of first instance. The case will go back to that court, in order that the execution of decree be carried out according to law.

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1908.

GOPAL DAS  
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Aikman, J.

*Appeal decreed.*

(1) [1876] I. L. R., 1 All., 132. (2) [1884] I. L. R., 7 All., 107

## BHAGWAN DIN

*versus*

## DIBBA AND OTHERS.\*

CRIMINAL.

1908.

January 21.

KNOX J.

*Second complaint—first, dismissed summarily—whether second barred.*

A Magistrate is not precluded from taking up a complaint on the facts on which a similar complaint had been summarily dismissed on a former occasion, and if it is shown that the complainant has some grounds for his complaint, the Magistrate should admit it. *Queen Empress v. Adam Khan*, I. L. R., 22 All., 108, distinguished.

CRIMINAL REFERENCE by William Tudball Esq., Sessions Judge of Cawnpore, with a recommendation that the order passed by E. F. Oppenheim Esq., Magistrate, First class, of Cawnpore be set aside.

The material facts appear from the judgment.

The parties were not represented.

The following judgment was delivered by

KNOX, J.—This case has been very properly reported by the Sessions Court of Cawnpore. The facts briefly are as follows :—One Bhagwan Din, on the 20th August 1907, filed

Knox J

Cr. Reference No. 1 of 1908.

CRIMINAL.

1908.

BHAGWAN DIN  
v.

DIBBA.

*Knox, J.*

a complaint against Dibba and others. The complaint was to the effect, that the accused had maliciously blocked a drain with the result that water accumulated and damaged the complainant's property. The Joint Magistrate, after recording, on oath, the statement of the complainant, passed the following summary order. "The case is one dealing with easements and can not, properly, be dealt with in this court. The complaint is therefore dismissed." Now if the complainant's property was damaged by the action of the accused and that action was, as stated in the complaint, the result of enmity, the complainant was undoubtedly entitled to have a hearing from the court, upon the complaint of mischief, and the Magistrate should not have summarily dismissed the complaint, because in his opinion it was one dealing with easements. The complainant, finding that he could not get a hearing from the Magistrate, then went to the police and filed a petition to the effect that the five men, against whom he had already complained of, as having committed mischief were his enemies and that he was in fear of his life. If the facts were, as stated by the complainant, in the complainant's belief, his action was not immaterial. This petition appears to have gone to a Sub-Inspector, who reported that there was reason in the complainant's fear, and that in his opinion the persons complained of should be bound over to keep the peace. The Sub-Divisional Officer, to whom this report went, called upon the complainant to furnish a complaint in due form. The complainant then filed a formal complaint rehearsing the facts which he had alleged in his first complaint and adding that he was in fear of his life. He did not in the complaint call the attention of the court to his first complaint, and the summary order of dismissal, which had been engrossed upon it. It would have been better had he done so. His second complaint, eventually, came before the same Magistrate who had summarily dismissed his first complaint. That Magistrate professing to act upon the case, *Queen Empress v. Adam Khan*,<sup>(1)</sup> discharged the accused, holding that the complaint must fail. He further held that the second complaint was frivolous and after calling upon the complainant to show cause ordered him to pay compensation.

(1) [1899] I. L. R., 22 All., 106

The result then is that the complainant has never had opportunity given him to support his complaint. His complaint has been summarily dismissed, not because the Joint Magistrate has found, that the allegations contained in his complaint can not be substantiated by evidence, but merely because in the opinion of the learned Joint Magistrate the case is one dealing with easements. The case, on which the learned Joint Magistrate relies, is a perfectly different case. So far as I know, this court has never held that a Magistrate is precluded, by a summary order of dismissal of a complaint, from taking up the same complaint again, if it is shown to him that the complainant has some ground for his complaint. On the first complaint no one had been summoned and no one had been, in any way, injured. The very persistence of the complainant and the fact that a second Magistrate, upon the same facts stated, was prepared to and did issue process, should have made the Joint Magistrate pause and consider whether his summary order of dismissal had not been too hastily passed. In any case without further enquiry, to pass an order directing the complainant to pay compensation was not justified. I set aside the order of compensation and also the summary order of dismissal and the order of discharge and I direct that the complaint be restored to the file and the complainant be given an opportunity either by such procedure as is laid down in section 202 of the Code of Criminal Procedure, or by issue of process in the usual way of producing evidence in support of his complaint. When the complaint has been restored to the file, the District Magistrate of Cawnpore should transfer the case from the court of the Joint Magistrate and either try it himself or have it tried by some other Subordinate Magistrate, competent to deal with it. The compensation, if paid, should be refunded.

*Order set aside*

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BHAGWAN DIN  
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Knox, J.

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1907.

December 16.

AIKMAN, J.

## SALIG RAM

versus

## TIKA RAM AND ANOTHER.\*

*Right of suit—Costs not allowed in execution department—Costs of objections—Suit not maintainable.*

Costs incurred by the plaintiff in preferring objections in the execution department, under section 278, Civil Procedure Code, cannot be recovered by a separate suit, even if the court states no reason for ordering that the costs should not follow the event. *Mahram Das v. Ajudhia*, I. L. R., 8 All., 452, and *Kadir Bux v. Salig Ram*, I. L. R., 9 All., 474, referred to.

SECOND APPEAL against the decree of Babu Shiva Prasad, Additional Subordinate Judge of Agra, modifying a decree of Babu Baidya Nath Das, Munsif.

Suit to recover compensation for illegal attachment.

The material facts appear from the judgment.

*Satya Chandra Mukerji*, for the appellant.

*Tej Bahadur Sapru*, for the respondent.

The following judgment was delivered by

Aikman, J.

AIKMAN, J.—The appellant, Salig Ram attached some bales of cloth as belonging to one Ram Chand, against whom he had obtained a decree for money. The plaintiffs-respondents filed an objection in the court executing the decree, claiming the attached property as their own.

That court sustained the objection, and ordered the property to be released from attachment. Thereupon the plaintiff brought the suit, out of which the present appeal arises, to recover compensation for the illegal attachment. The plaintiff sought to recover Rs. 294-4-0. This amount was partly on account of the depreciation in value of the cloth, whilst under attachment, and partly on account of the expense, to which the plaintiffs had been put in preferring their objections before the executing court. The court of first instance estimated the amount of damages, sustained by detention of the cloth at Rs. 27-2-0, but held

\* S. A. No. 1013 of 1906.

that no suit could be maintained for recovery of the costs, incurred by the plaintiffs in objecting to the execution. A decree was, accordingly, passed in favour of the plaintiffs for Rs. 27-2-0. Both parties appealed. The defendant's appeal was dismissed. The lower appellate court allowed the plaintiffs Rs. 78-8-0, in addition to the amount decreed by the first court, on account of the costs incurred by them, in preferring their objections in the court executing the decree.

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SALIG RAM  
v.  
TIKA RAM.  
Aikman, J.

The defendant comes here in second appeal. The first ground in the memorandum of appeal is not supported. The second is that no separate suit is maintainable to recover costs, which might have been, but were not, awarded by the court which heard the objection. In my opinion, this plea must be sustained. The court which, disposed of the objections, might have given the plaintiffs their costs. It did not. It ordered the parties to bear their own costs. No doubt the court overlooked the proviso to section 220, inasmuch as it did not state its reasons, in writing, for directing that the costs of the application should not follow the event. No appeal lay against the order of the court. It is possible that the plaintiffs might have got their costs, by making an application for review. They did not adopt this course, and the question is whether, the Court, which might have awarded costs, not having done so, a separate suit is maintainable to recover them.

I have no hesitation in holding that the view, namely, that a separate suit for costs will not lie, is right. The learned advocate for the respondents has been good enough to call attention to two rulings—*Mahram Das v. Ajodhya* <sup>(1)</sup>, and *Kadir Bux v. Salig Ram* <sup>(2)</sup>, which support the view I take.

I allow the appeal with costs, and setting aside the decree of the lower appellate court with costs, restore that of the court of first instance.

B. C. M.

*Appeal decreed.*

(1) [1886] I. L. R., 8 All., 452.

(2) [1887] I. L. R., 9 All., 474.

CIVIL.

1907.

November, 28.

AIKMAN, J.

RAMBHAJAN LAL

*versus*

SHEO PRASAD AND ANOTHER.\*

*Principal and Surety—Admission of the principal debtors.*

In an action against a surety, the liability must be proved against the surety independently of any admissions by the principal debtor which are in law no evidence against the surety. *Ex parte Young* L. R., 17 Ch. D., 668, referred to

SECOND APPEAL against the decree of Babu Srish Chandra Bose, Subordinate Judge of Ghazipur, reversing a decree of Babu Ramchandra Saksena, Officiating Munsif of Mohammadabad.

Suit for sale upon a security bond.

Plaintiffs appointed defendant No. 1 as their *karinda*. Musammat Bartana, wife of Jaidyal Lal stood surety for defendant, and executed a security bond hypothecating certain property, standing in her own name. Upon the death of the said Jaidyal Lal, and Musammat Bartana, the appellant came into the sole possession of the property as legal representative. It was alleged by the plaintiff that Rs. 73-1-4 were found due by the defendant No. 1., the *karinda*, and that he had admitted the debt in a *goshwara*, signed by him. The defendants put forward the plea, *inter alia*, that they did not admit the balance admitted by the principal debtor, and put the plaintiff to proof of it.

The court of first instance found that there was no proof that any sum was found due by the defendant No. 1; that the admission of the principal debtor was not proved, and, even if it were proved that it could be no evidence as against the surety. The suit was accordingly dismissed.

The lower appellate court finding that the bond, though ostensibly executed by the wife, had really been executed by the said Jaidyal, and that the "*goshwara*" was proved to be in the hand-writing of the principal debtor, reversed the decree of the first court, and decreed the suit.

\* S. A. 281 of 1906.

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The defendant, Rambhajan Lal appealed.

*Haribans Sahai*, for the appellant, contended that the Subordinate Judge was not entitled to set up a new case for the first time on appeal, and that the *goshwara* was no evidence as against the appellant, inasmuch as it was nothing more than an admission of the principal debtor, and it could not bind the surety, and that there was no evidence other than the *goshwara* to prove the defalcation. He relied upon

*Shivabasava v. Sangappa*, (1905) I. L. R., 29 Bom., 1, and

*Ex parte Young*, (1881) 17 Ch. D., 668, 671.

*Gokul Prasad*, for the respondents, replied.

The following judgment was delivered by

AIKMAN, J.—This appeal arises out of a suit brought to enforce payment of a debt from a surety. The defendant did not admit the debt. The only evidence to prove it was an admission of the principal debtor. That is not sufficient. It was held in the case of *Ex parte Young*<sup>(1)</sup>, that even a decree against the principal debtor is no evidence against the surety as to the amount of the debt. LUSH, L. J., remarks at page 673:—"The creditors must have proved it over again against the surety, because he is not bound by any admissions or statements of the principal as to what amount is due. He is only bound to pay the amount, which shall be proved against him." There being, therefore, no evidence of the debt against the defendant, the court of first instance was right in dismissing the suit. The lower appellate court, I may remark, made out a new case for the plaintiffs, which was not warranted either by the pleadings or the evidence. I allow the appeal, and setting aside the decree of the lower appellate court, restore that of the court of first instance. The appellant will have his costs here and in the court below.

*Appeal allowed.*

(1) [1881] 17 Ch. D., 668.

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RAMBHAJAN LAL  
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*Aikman, J*



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1908.

February 11,

STANLEY, C. J.  
BURKITT, J.

LACHMAN DAS

versus

APPRAKASH.\*

*Code of Civil Procedure, (Act XIV of 1882), section 508—Provisions mandatory and imperative—No time fixed in the order of reference—No award.*

The provisions of section 508 of the Code of Civil Procedure are mandatory and imperative.

Where the court appointed an arbitrator but did not fix the time within which the award was to be filed, and the arbitrator filed the award that very day :—*Held*, that the proceedings were obnoxious to the mandatory provisions of section 508 and the award was no award in law. *Raja Har Narain v. Chaudhrain Bhagwant Kuar*, L. R., 18 I. A., 55 followed.

FIRST APPEAL from the decree of Chajju Mal Esq., Subordinate Judge of Aligarh.

Suit for possession of property.

During the pendency of the suit, the parties put in an application asking the court to refer the case to the arbitration of Lala Jugal Kishore and Lala Parmanand, who were stated to be present in court. The Subordinate Judge ordered that "the case be referred to arbitration." No time was fixed for the return of the award. The arbitrators wrote out an award, and put it in court on the same day. The plaintiff objected to the award on the ground that the award was in excess of the reference. The Subordinate Judge passed a decree in terms of the award.

The plaintiff appealed.

*B. E. O'Connor* (with him *Durga Charan Banerji, Gulsari Lal and Iswar Saran*), for the appellant, submitted that there was no award. The omission of the Subordinate Judge, to name the arbitrators in the order, was illegal, and rendered the award void. Further no time was fixed within which the award was to be delivered, and this omission vitiated the proceedings, inasmuch as section 508 of the Code of Civil

\* F. A. 30 of 1906

Procedure was mandatory. The arbitrators were guilty of misconduct in making an award without holding proceedings. He relied on

*Chuka Mal v. Hari Ram*, [1886] I. L. R., 8 All., 548.

*Raja Har Narain v. Choudhrain Bhagwant*, [1891] I. L. R., 13 All., 300.

*Deoki Nandan v. Raj Kumar*, [1889] A. W. N., 124.

*Mohan Lal Nehru* (with him *Moti Lal Nehru*), for the respondent, submitted that the Privy Council case in I. L. R., 13 All., 300 was no authority in support of the appeal, as the point now in dispute was not raised in that case. He relied on

*Mubarik Ali v. Kadir Baksh* [1875] 7 All., H. C. 351.

which he submitted was exactly on all fours with this case.

[STANLEY, C. J.—The Privy Council has decided that the provisions of section 508 are imperative and mandatory].

The remarks were *obiter* as the decision of the case did not turn upon them. In the objections which the plaintiff raised in the court below, he did not raise any objection as to the invalidity of the award. He only said that it was in excess of the reference. He could not raise the point in appeal. It was no doubt the intention of the parties that the arbitrators should put in the award that very day. The omission of the time from the order was not, therefore, fatal.

*B. E. O'Connor*, was not heard in reply.

The judgment of the Court was delivered by

STANLEY, C. J.—The decree in this case, in respect of which the appeal before us has been preferred, was passed upon a so-called award. After evidence had been given and some of the issues in the case had been determined by the court, and there remained two issues only for determination, by consent of the parties, the matters in difference were left to the arbitration of two gentlemen who happened to be present in court. The court there and then passed an order referring the matter to arbitration, but did not as is required by section 508 fix a time for the delivery of the award or name the arbitrators. The arbitrators forthwith proceeded in court without the examination of the parties, to draw up an award and upon the award so drawn up which does not deal specifically with the two issues which remained undetermined, a

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decree was passed. The main objection to the decree which was so passed, is that the whole proceedings were irregular, owing to the fact that the provisions of section 508 were not complied with. Other objections were also raised with which we think it unnecessary to deal. If the only objection were, in respect of the omission, to fix a date for the delivery of the award, we should have been disposed to regard that as an irregularity, which would be cured by the acquiescence of the parties in the preparation of the award by the arbitrators, were it not for the clear and explicit language of their Lordships of the Privy Council. Indeed, in this court there is a decision of a Bench that the omission in the order of the court to fix a time for the delivery of the award would invalidate the award. This was the case of *Chuha Mal v. Hari Ram* <sup>(1)</sup>. In that case OLDFIELD and BRODHURST, JJ., held that the law requires that there shall be an express order of the court, fixing the time for the delivery of the award, or for extending or enlarging such time, and that an award, which is, invalid under section 521 of the Code of Civil Procedure, because not made within the period allowed by the court, is not an award upon which the court can pass a decree, and a decree passed in accordance with such an award is not a decree, in accordance with an award from which no appeal lies. The Privy Council pronouncement, to which we have referred, was made in the case of *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar and another* <sup>(2)</sup>. Lord Morris, delivering the judgment of the Board, observes "Their Lordships are of opinion that section 508 is not merely directory but that it is mandatory and imperative. Section 521 declares that no award shall be valid, unless made within the period allowed by the court, and it appears to their Lordships that this section would be rendered inoperative, if section 508 is to be merely treated as directory." In view of this statement of the law by their Lordships, we cannot but regard the proceedings taken in this suit as being obnoxious to the mandatory provisions of section 508, and accordingly, we must allow the appeal. Allowing the appeal, we set aside the decree of the court below and remand the suit to that court,

(1) [1886] I. L. R., 8 All., 548.

(2) [1891] L. R., 18 I. A., 55 S. C. I. L. R., 13 All., 300.

under section 562 of the Code of Civil Procedure, with directions that it be reinstated in its original number in the file of pending suits and be disposed of according to law. Costs here, including fees on the higher scale, and hitherto will abide the event. Objections have been filed by the plaintiff-appellant, under section 561 of the Code. These objections fall to the ground in consequence of our decision on the appeal. We dismiss them but without costs.

X

*Appeal decreed.*

SHAHBAZ KHAN AND OTHERS

*versus*

UMRAO PURI AND OTHERS.\*

*Code of Civil Procedure, (Act XIV of 1882), section 11—Religious rites and ceremonies—Killing of cows—Declaration of right—Jurisdiction of Civil Court—Nuisance.*

It is the legal right of every person to make such use of his own property, as he may think fit, provided that in doing so, he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. Where the District Magistrate had ordered the Mahomedans of a village not to kill kine anywhere in the village, and the Mahomedans sued for declaration of their right and injunction, *held* that the right claimed was one to which they were legally entitled irrespective of custom, and were entitled to a declaration of such right. Slaughter of cattle could only be prohibited, where it amounted to public nuisance and was obnoxious to the rules and regulations lawfully promulgated for observance, and not when it was calculated to irritate the religious susceptibilities of a class or community.

FIRST APPEAL from a decree of W. Turner Esq., District Judge of Shahjahanpur.

The material facts were as follows:—The Hindus of the village, Behta Gushain, applied to the Collector at Shahjahanpur to prevent the Mahomedans from slaughtering cows within a certain enclosure, which was the property of Mahomedans. The Collector issued notice to the Mahomedans, and after hearing them passed an order that there was no custom of slaughtering cows in that village, and the Mahomedans should not do that. The plaintiffs, thereupon, brought this suit for a declaration of their right to slaughter cows, and an injunction restraining the Hindus from interfering with that right. The court below dismissed the suit holding that a right to slaughter cows was not established.

\* F. A. 247 of 1905.

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Plaintiffs appealed.

*Ghulam Muftaba* (with him *Mahomed Ishaq*), for the appellants. The application of the defendants to the Magistrate was a denial of the plaintiff's right. The case would have been quite different, if they had not denied the right of the plaintiffs. As they moved the Magistrate, a decree should be passed against them. It is not a suit where the plaintiffs want a declaration that they are entitled to slaughter anywhere they please, but they want a declaration to slaughter on their own land. If they do anything to injure the religious feelings of the Hindus, they will be liable to criminal prosecution. It has been held that a Magistrate has no power to restrain any one from holding a market on his own land, and the same principle should govern the present case.

*Thakoor Singh v. Sheo Pershad*, [1872] 5 N.-W. P., H. C. 8.

*Gopi Mohan v. Taramoni*, [1879] I. L. R., 5 Cal., 7 F. B.

[BURKITT, J.—You want a declaration that you can do anything lawful on your land.]

Yes. The sacrifice of cows on Bakrid-day is not unlawful. It is no ground to refuse an injunction that a certain thing would offend the religious feelings of others.

*Behari Lal v. Ghisa Lal*, [1902] I. L. R., 24 All., 499.

Right to slaughter cows on Bakrid-days was considered on the criminal side of this court.

*Queen Empress v. Imam Ali*, [1887] I. L. R., 10 All., 150.

*Tej Bahadur Sapru* (for *Satish Chandra Banerji*), for the respondents. There are three points for consideration in this case. (1) Whether this is a suit of a civil nature and the plaintiffs have a cause of action. (2) Whether a declaration could be granted in favour of the plaintiffs. (3) Whether the plaintiffs were entitled to an injunction. As to the first, I submit that under section 11 of the Code of Civil Procedure, a suit of a civil nature is a suit in which the right to property or office is involved. In the present case, none of these questions are involved and, therefore, it cannot be maintained.

[STANLEY, C. J.—The section does not say that those are the only suits of civil nature.]

In every suit a legal right must be involved. The mere fact that the plaintiff is entitled to a right does not entitle him to come into court seeking a declaration. There must be an invasion of right.

[STANLEY, C. J.—It is a right to property to kill cattle on his land, wherever he likes.]

This is not a case where the plaintiffs were stopped from killing cattle by the defendants. There is an executive order of a Magistrate passed against them. The order may be right or wrong. It cannot be interfered with by the Civil Court. He cited.

*Rama v Shiva Ram*, [1882] I. L. R., 6 Bom., 116.

*Vasudev v. Vamnaji*, [1880] I. L. R., 5 Bom., 80.

As to the second point, I submit that this court should not interfere with the discretion of the court below. A declaration cannot be claimed as a matter of right.

The vakil for the appellants having intimated that he withdrew his claim for injunction, the last point was not argued.

*Ghulam Mujtaba* was not heard in reply.

The judgment of the Court was delivered by

STANLEY, C. J.—The litigation which has led to this appeal might we think have been avoided by the exercise of some common sense and toleration. The question before us is whether the members of the Mahomedan community in the village of Behta Gushain in the District of Budaun have a right to slaughter cows, within their own premises in the village for the purpose of daily food as well as for sacrifice, under any limitations or otherwise. The village in question has a population of about 3000, of whom less than a thousand are Mahomedans and the remainder Hindus. The defendants, on the 16th of November, 1903, applied to the District Magistrate of Budaun for an order that the Mahomedans in the village might be forbidden to slaughter kine in the village. A charge was, thereupon, preferred against the plaintiff, Shahbaz Khan and others, purporting to be under section 107 of the Code of Criminal Procedure. On the 6th of December, 1903, the District Magistrate passed an order, prohibiting the slaughter of any cattle in the village. In his order, he states

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as follows :—" It appears that the Hindus far out-number the Mahomedans. I find there are other villages in this *thana-circle*, where slaughter never takes place, and where it would be strongly objected to, at Bilsa itself for instance. There is in fact a general understanding that it should only be allowed in places, where it has been customary. For these reasons, I forbid it in Behta Gushain." The following also appears in the order, " As there is some ill-feeling over the matter, a copy of this order is to go to the Sub Divisional Magistrate, with a view to proceedings under section 107 of the Code of Criminal Procedure. If any action is taken, the leaders of both sides should be bound over ; but as the Mahomedans are in the wrong, no security, more than is absolutely necessary, should be taken from the Hindus."

Although this order purports to have been passed under section 107, it is clear that it was not an order under that section. Whether indeed it is anything more than mere *brutum fulmen*, it is difficult to say, but whatever it be, it is clear that the members of the Mahomedan community in the village of Behta Gushain cannot slaughter kine, except at the risk of criminal proceedings. The order of the Magistrate was confirmed by the Commissioner, on the 18th of February, 1904.

The plaintiffs, feeling aggrieved at the prohibition of the exercise of what they conceive to be their legal rights, instituted the suit out of which this appeal has arisen. The defendants took defence and denied the right claimed by the plaintiffs, and put forward the case that there was no custom of slaughtering or sacrificing cows in their village, and that the plaintiffs were not competent to do anywhere, in the village, any act which might be injurious or annoying to the defendants or repugnant to their religious feelings. They also denied that a suit of the kind was cognizable in the Civil Court.

The learned District Judge decided this last issue in favour of the plaintiffs, and we think rightly. The right claimed was, as he said a right of a substantial and valuable nature, and not of the nature of a right to a mere dignity or privilege unconnected with fees or emoluments, such as were dealt with in the cases to which he referred. He, however, dismissed the plaintiffs' claim on the ground, *that they had failed to prove that they had continuously slaughtered kine for consumption at*

*the slaughter house in the village or had continuously in observance of the sacrifice of kurbani killed kine on the Id-ul-zuha in the slaughter house or in their houses.* The burden of proving such custom he laid upon the plaintiffs, and dismissed the suit. He further found that the plaintiffs could in no case be entitled to a declaration, as against the world, of a right to slaughter cattle.

The appeal before us was then preferred, and the main contention advanced on behalf of the appellants is that the court below was wrong in holding that the suit was based on custom alone ; that independantly of any custom, every Mahomedan has a right to do all lawful acts within and upon his own property and, if any one interfere with the exercise of his legal rights, to obtain from the court a declaration of such rights that the killing of cows on their own land, not being an unlawful act, the plaintiffs were entitled to a decree, irrespective of any custom and further that the court below was wrong in holding that the relief sought was claimed against the whole world, and could not be granted as against the defendants alone.

Now upon the main question, we should in the first place premise that the slaughter of cattle under certain circumstances would be a public nuisance, and it might also be obnoxious to rules and regulations lawfully promulgated for observance, in a town or village, and further that kine must not be slaughtered in such places or manner as to be a nuisance or in contravention of any such rules and regulations. We may also say that it is in the highest degree desirable that the members of the different religious persuasions, who are to be found in this country, should in the observance of their religious ceremonies, as well as in the exercise of their lawful rights, show respect for the feelings and sentiments of those belonging to different persuasions and avoid anything calculated to irritate the religious susceptibilities of any class of the community. But when a question in which the ordinary rights of property are involved comes before us, we must before we can allow those rights to be infringed, endeavour to find the existence of some principle or rule of law justifying a ruling that the wishes or susceptibilities of individuals can be allowed to over-ride such rights. Acts calculated to offend the sentiments of a class do not necessarily amount to a public nuisance. *Len non favet votis delicatorem.* The law

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makes no allowance for the susceptibilities of the hyper sensitive. In our judgment, then, we shall deal simply with the broad question whether the right to slaughter kine on their own premises by Mahomedans in the village of Behta Gushain is illegal. TURNER, C.J., in the case of *Muttumira v. Queen Empress* <sup>(1)</sup>, observed "a public nuisance is defined by the Penal Code as an act or omission which causes any common injury, danger, or annoyance to the public or people in general, who dwell or occupy property in the vicinity or which must necessarily cause obstruction, danger, or annoyance to persons, who may have occasion to use any public right. It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country, it must often happen that acts are done by the followers of a creed, which must be offensive to the sentiments of those who follow other creeds." In the case of *Queen Empress v. Byramji Edalji* <sup>(2)</sup>, an accused appealed against his conviction of an offence, under section 268 of the Indian Penal Code, in having cut up on his *verandah*, meat which was to be cooked for a dinner party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by. The Magistrate had found the accused guilty of committing a public nuisance on the ground that he had done an act by which several persons who were Jains were much annoyed, they having a great repugnance to the taking of life, under any circumstances. The conviction was set aside by BIRDWOOD and PARSONS, JJ., who in the course of their judgment observed that the annoyance complained of "neither did nor could cause any sensible or real damage. It was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals. It was thus of the nature of a sentimental grievance, which could be felt only by persons holding certain views as to the killing of animals." In the case of *Queen-Empress v. Zakhiuddin* <sup>(3)</sup>, certain Mahomedans had been convicted on a charge of having, for a religious purpose, killed and cut up two cows, before sun-rise in a private compound, partly visible from a public road, the killing of one cow being witnessed by a

(1) [1884] I. L. R., 7 Mad., 591. (2) [1887] I. L. R., 12 Bom., 437.

(3) [1887] I. L. R., 10 All., 44.

Hindu. It was held by BRODHURST, J., on an application for revision of the order of conviction passed by the Magistrate under section 290 of the Indian Penal Code, that the circumstances proved did not amount to the commission of a public nuisance as defined in section 268 of the Code. Further in the case of *Queen Empress v. Iman Ali and another* <sup>(4)</sup>, it was held by a Full Bench of this High Court that a cow was not "an object within the meaning of section 295 of the Criminal Procedure Code," and that the slaughter of a cow was not an offence under that section. The decision in *Romesh Chunder Sannyal v. Hiru Mondal* <sup>(5)</sup>, is to the same effect.

In an earlier case in the Calcutta High Court, namely, *Hajee Mazhur Ali and others v. Gundownee Sahoo* <sup>(6)</sup>, the legality of an order passed by a Deputy Magistrate in a prosecution under section 521 of the Criminal Procedure Code, then in force, in which he treated the slaughter of cattle as a nuisance and ordered its discontinuance within a private enclosure belonging to some Mahomedans was considered. KEMP and GLOVER, JJ., held that although the act complained of might be shocking to the prejudices of Hindus, it could not properly be regarded as a nuisance, and that at any rate the act being done in a private place and not on a thoroughfare, it could not be dealt with under section 521. In the course of their judgment the learned Judges say "that Hindus should object, with all their strength to the killing of cows in an enclosure within a few yards of their dwelling, is natural enough, but this would not make such killing a nuisance in the legal sense of the term. The animals were sacrificed within a walled enclosure, no one could see the process from the outside and it is not alleged that the sacrifices were made occasion for noisy or riotous demonstration which could affect the comfort of the neighbours. It was simply and solely a matter of religious feeling. The complainant had no objection to other animals being sacrificed within the enclosure in question, he even suggested that the petitioners might kill sheep or camels there if they liked, what he objected to was the slaughter of the sacred cow."

(4) [1888] I. L. R., 10 All., 150. (5) [1890] I. L. R., 17 Cal., 852.

(6) [1882] 25 W. R. 72.

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The same question came before a Bench of this Court in second appeal No 1028 of 1881, in the case of *Raghuber Dyal and others v. Ameeran Jahan* (unreported). In that case the respondent Ameeran Jahan brought a suit for a declaration of her right to offer a cow in sacrifice annually, on certain days within the enclosure of her house and notwithstanding an order of the Deputy Magistrate forbidding the sacrifice, a decree was passed in her favour, whereby the defendants were restrained from interfering with the sacrifice of an Idulzuha victim of any kind on the premises of the plaintiff during the 10th, 11th and 12th days of the month of Zilhij, provided that the sacrifice should be completed within the inner quadrangle of the house, and that from the commencement to the completion of the sacrifice the outer doors of the house should be kept closed, and provided also that the decree should have no effect as against any rule or regulation of the Municipality of Shah-jahanpur, the town in which the parties resided, which might thereafter be promulgated regarding Idulzuha sacrifices in general. The decision of the learned officiating Judge was affirmed by BRODIEURST and TYRRELL JJ., on the 4th of May 1882.

In view of these authorities it appears to us indisputable that under certain limitations the slaughtering of kine by Mahomedans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law even though he may thereby hurt the susceptibilities of others. The learned District Judge was wrong in our judgment in holding, that the *onus* lay upon the plaintiffs appellants, of proving the existence of a custom allowing the slaughter of kine in their village. The right claimed is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with.

We, therefore, allow the appeal, set aside the decree of the court below and give a decree to the plaintiffs declaring that they have the right which they claim namely to slaughter cows in the *Mazbah* belonging to them in Behta Gushain for daily consumption as also for consumption at festivals, and in their

houses for the purpose of sacrifice provided that in the exercise of such right they do not commit a nuisance or offend any rule or regulation lawfully promulgated and applicable to that village. We also grant an injunction restraining the defendants from interfering with the rights of the plaintiffs appellants as above declared. The defendants respondents must pay the costs of this appeal as also the costs in the court below.

X.

*Appeal decreed.*

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SURAJ BALI

*versus*

EMPEROR.\*

*Penal Code (Act XLV of 1860), section 338— Operation for cataract—  
failure of operation—negligence.*

When an accused in good faith performed an operation upon a woman with her consent for cataract according to the recognised method of Indian eye surgery, the result of which was that she lost her eyesight, *held* that he was not guilty of an offence, under section 338 of the Indian Penal Code.

CRIMINAL REFERENCE by Mohammad Ali Esq., Sessions Judge of Mirzapur, recommending that the conviction and sentence, passed upon the accused, may be set aside.

The material facts appear from the judgment.

The following judgment was delivered by

AIKMAN, J.—This case has been referred by the learned Sessions Judge of Mirzapur, with a recommendation that the conviction of one Suraj Bali of an offence under section 338 of the Indian Penal Code and a sentence of fine passed thereon should be set aside.

*Aikman, J.*

After hearing the learned Counsel for the accused and the learned Assistant Government Advocate for the Crown, I am of opinion that the conviction can not be sustained. It appears that the accused operated on an old woman named Basantia for cataract and the result of the operation was that she lost

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*Aikman J.*

the sight of the left eye. The Magistrate found that the operation was performed with the consent of Musammat Basantia; that it was performed in good faith for her benefit, and that the operation is the recognised Indian method of treatment of cataract. Section 338 renders punishable any one who causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others.

In my opinion on the facts found, the accused's act does not fall within this section. The operation which he performed is a recognised method of Indian eye surgery. Six witnesses were called by the accused who stated that he had successfully treated them for cataract. Undoubtedly the operation is attended with some degree of risk, a risk which is apparently much greater than attends an operation for cataract after the English method. Even this latter method is not always successful. In his cross examination, the Civil Surgeon said:—"Last year, I had 79 cases in which I had one failure; there were some failures."

It may be that the complainant has a remedy in the civil court against the accused, if he treated her negligently, but in my opinion, the evidence does not prove that he committed any criminal offence.

I accept the recommendation of the learned Judge and quash the conviction of Suraj Bali, under section 338 of the Indian Penal Code and the order of fine; the fine, if paid, will be refunded.

*Conviction quashed.*

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*versus*

EMPEROR.\*

*Code of Criminal Procedure (Act V of 1898), section 271—Statement  
not recorded—Procedure.*

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Section 271 of the Code of Criminal Procedure provides that when the court is ready to commence a trial, it shall read out and explain the charge to the accused and record his plea of guilty or not guilty. When the Sessions Judge does not record any plea, he does not comply with the provisions of the section. When an accused instead of pleading guilty makes a long and rambling statement more or less admitting his guilt, the Judge ought to record a plea of not guilty and proceed to try the case. *Queen Empress v. Bhadu*, I. L. R., 19 All, 119 referred to.

CRIMINAL APPEAL from an order of Additional Sessions Judge of Aligarh.

The material facts appear from the judgment.

The appellant was not represented.

*W. K. Porter* (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

RICHARDS, J.—The appellant Musammat Deoki has been sentenced to transportation for life by the Additional Sessions Judge of Aligarh. The learned Sessions Judge says that he convicted the appellant on her plea of guilty. There is no doubt that the statement made by the appellant before the committing Magistrate would have amounted to a plea of guilty, or perhaps it would be more correct to say that she might be convicted of murder on this statement. In our judgment, the learned Judge has not paid the attention which he ought to have paid to the provisions of section 271 of the Code of Criminal Procedure. That section provides that when the court is ready to commence a trial, and the accused is brought before it, the charge shall be read out in court and explained, and the accused shall be asked whether he is guilty of the offence charged or claims to be tried. If he pleads

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guilty, the plea *shall be recorded* and he may be convicted thereon. In the present case, the learned Sessions Judge has not recorded any plea of guilty: He has not recorded even the exact words which the accused used when called upon to plead. As a result, the learned Judge has neither on his own responsibility recorded a plea of guilty in so many words, nor has he recorded the words used by the accused, which would have enabled this Court to judge whether or not the plea amounted to a plea of guilty. This is not the first case in which we have had to call attention to the neglect to comply with the provisions of section 271 (we do not refer to the learned Judge who tried this case). In cases where the accused, instead of pleading guilty in the words of the section, makes a long rambling statement more or less admitting guilt, it would be much safer if the Judge recorded a formal plea of not guilty, and proceeded to try the case in the ordinary way, recording the evidence. We may here refer to the case of *Queen-Empress v. Bhadu* <sup>(1)</sup>. In the petition of appeal in the present case, the accused, while admitting that she fell into the well with the child in her arms, says that it was unintentional. This would have amounted to a plea of not guilty. We think it safer in the present case to set aside the conviction and sentence, and order the appellant to be retried.

*Retrial ordered.*

(1) [1896] I. L. R., 19 All., 119.

## TAJ-UD-DIN AND OTHERS

*versus*

## EMPEROR.\*

*Penal Code (Act XLV of 1860), section 430—Mischief—Canal Act  
(VIII of 1873), section 70..*

When the accused cut the *patri* on the borders of the canal distributary, and through the gap thus made turned off the water from the distributary to their fields, they were not guilty of committing mischief but were guilty of an offence, under the Canal Act.

CRIMINAL REVISION against an order of J. H. Cumming Esq., Additional Sessions Judge of Aligarh, affirming an order of Pandit Ram Prasad Tewari, Magistrate.

The material facts appear from the judgment.

*B. E. O'Connor* (with him *G. W. Dillon*), for the applicants.

*W. K. Porter* (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

KNOX, J.—Taj-ud-din, Abdul Wahid and Najm-ud-din have been convicted of an offence, under section 430, Indian Penal Code, and each of them has been sentenced to rigorous imprisonment for six months. The evidence on the record, which is not disputed, establishes that the accused cut the *patri* on the borders of the canal distributary, and through the gap thus made turned off the water from the distributary to their fields. It is contended that this act falls within section 70 of Act No. VIII of 1873, and not within the four corners of section 430, Indian Penal Code. One essential element of an offence, under section 430, *viz.*, that by the act done a diminution of the supply of water for agricultural purposes is caused or likely to be caused is not proved. This plea appears to me to be a good one. I alter the conviction from a conviction, under section 430 to a conviction under section 70 of Act No. VIII of 1873, and I reduce the sentence to a sentence of one month's rigorous imprisonment upon each of the applicants. Any imprisonment undergone by the petitioners will be deemed part of the sentence passed, under section 70 of Act No. VIII of 1873.

*Conviction altered.*

\* Cr. R. 11 of 1908.

XXI

CRIMINAL.

1908.

February, 4.

KNOX, J

*Knox, J.*



CIVIL.

1908.

February 3.

BANERJI, J.  
RICHARDS, J.

BAHADUR SINGH

versus

NEGI PURAN SINGH.\*

*Appeal—Decree upon award passed upon a private arbitration—Code of Civil Procedure (Act XIV of 1882), sections 522, 526.*

When a matter is referred to arbitration, without the intervention of a court and a decree is passed upon the award made by the arbitrators, no appeal lies against such a decree, except in so far as it is in excess of or not in accordance with the award. *Mustafa Khan v. Phulja Bibi*, I. L. R., 27 All., 526 not followed.

FIRST APPEAL from a decree of Subordinate Judge of Dehra Dun.

*Sital Prasad Ghose*, for the appellant.

*Sundar Lal* for the respondent.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—This appeal arises out of a suit brought under the provisions of section 525 of the Code of Civil Procedure, for the filing of an award made by an arbitrator, appointed without the intervention of a court. The parties referred their disputes to the arbitration of an arbitrator, on the 25th of January, 1904. The arbitrator made his award, on the 20th of October 1904. Objections were raised on behalf of the appellant, in regard to the award which were overruled, and the court ordered the award to be filed and made a decree in accordance with it. From this decree the present appeal has been preferred. A preliminary objection is taken on behalf of the respondent to the effect that no appeal lies. In our judgment, this objection must prevail. Section 526 of the Code of Civil Procedure provides that if no ground such as is mentioned or referred to in section 520 or section 521 be shown against the award, the court shall order it to be filed, and such award shall take effect as an award made, under the provisions of Chapter XXXVII. As soon, therefore, as the court orders an award to be filed, the provisions

\*F. A. 276 of 1905.

of section 522 become applicable. One of those provisions is that on a judgment being given by the court, a decree shall follow, and no appeal shall lie from such a decree, except in so far as the decree is in excess of or not in accordance with the award. It is admitted that the decree in the present case is not in excess of the award. It is further admitted that if the decree in the present case had been a decree in a suit, which the parties had referred to arbitration through the intervention of the court, no appeal would have lain. But it is contended that there is a difference between such a case and a case in which a reference is made, without the intervention of a court. We fail to see that any such distinction exists. As we have said above, according to the provisions of section 526, when a court orders an award to be filed, section 522 must apply, that is to say, a decree must be made, on judgment being pronounced by the court; so that if this decree be not in excess of the award or does not vary the award no appeal would lie. We have been referred by the learned vakil for the appellant to the case of *Mustafa Khan v. Phulja Bibi* <sup>(1)</sup>. In that case, a Bench of this Court entertained an appeal under similar circumstances, but the question, whether an appeal lay or not, does not appear to have been raised, and it certainly was not decided. We are, therefore, unable to regard that case as an authority for the contention that in the case of a private arbitration when a decree is made by a court in accordance with the award, an appeal lies. We, accordingly, allow the objection, and holding that no appeal lies, dismiss the appeal with costs. The objection preferred under section 561 of the Code of Civil Procedure necessarily fails. We dismiss it.

*Appeal dismissed.*

(1) [1905] I. L. R., 27 All., 526.

CIVIL.

1908.

BAHADUR SINGH  
v.

NEGI PURAN  
SINGH.

—  
*Banerji, J.*

CIVIL.

1908.

February 18.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

SIRAJ HUSAIN

versus

BULAKI RAM.\*

*Evidence Act (1 of 1872), section 91—Promissory note, loss of—proof of contents.*

Where a plaintiff bases his cause of action on a promissory note, which he alleges had been lost, he cannot prove the contents, unless he succeeds in proving the loss of the document, apart from the note in which the contract was recorded *Banarsi Prasad v. Fazl Ahmad*, I. L. R. 28 All., 298 distinguished.

FIRST APPEAL against the order of A. Kendall Esq., Additional Judge of Meerut, reversing a decree of Saiyid Jawad Husain, Additional Munsif of Meerut.

Suit for money.

The material facts appear from the judgment.

The court of first instance dismissed the suit, but the lower appellate court reversed the decree.

Defendant appealed.

*S. C. Chaudhari* (for *S. C. Banerji*), for the appellant.

*Taj Bahadur Sapru*, for the respondent.

The judgment of the Court was delivered by

Aikman, J.

AIKMAN, J.—This is an appeal from an order of remand. The plaintiff respondent sued to recover from the defendant appellant the sum of Rs. 341 principal, and interest due from the defendant on a note of hand, dated the 8th of August, 1902, also for a sum of Rs. 9 separately borrowed.

The note of hand was not produced. The plaintiff, in his plaint, makes a statement which, if proved, would have justified him in giving secondary evidence of the contents of the note. The court of first instance found that loss of the promissory note had not been proved, and dismissed the suit. On appeal, the learned Additional Judge, without deciding whether the loss of the promissory note had been proved, held that it was open to the plaintiff to give oral evidence of the debts. It is

\*F. A. F. O., No. 32 of 1907.

possible as held in the case of *Benarsi Prasad v. Fazal Ahmad* (1), that if a plaintiff lends money to defendant, and as security for the loan takes a promissory note, it may be open to him to give evidence *aliundi* to prove the consideration even if the note be not admissible in evidence. Here the suit is on the promissory note, and it seeks to recover the interest set forth in the promissory note.

In our opinion, section 91 of the Evidence Act applies, and the terms of the loan could not be in this case proved, except by production of the document in which those terms are recorded, or by secondary evidence of its contents, assuming secondary evidence to be admissible.

In our opinion, the remand, made by the court below, was not justified. The learned Additional Judge should, with reference to the grounds of appeal before him, himself examine the evidence, and if in his opinion, the loss of the note is proved, he should admit secondary evidence of the contents of the note, and of the amount, if any, due under it. We allow the appeal, and setting aside the order of the court below, remand the case to that court with directions to re-admit the appeal, under its original number in the register and dispose of it on the merits, with reference to the above observations. Costs here and hitherto will abide the result.

*Appeal decreed.*

(1) [1906] I. L. R., 28 All., 298.

JANKI PRASAD SINGH

*versus*

BALDEO PRASAD TIWARI AND OTHERS\*

*Contract Act (IX of 1872), section 69, 70—Fictitious assignee of judgment-debtor—Right to make payment.*

In order to get the benefit of section 69 of the Contract Act, the party making a payment on behalf of another, before he can recover the amount so paid, must show that he had an interest in making the payment. *Ram Tahal v. Biseswar Lal*, L. R., 2 I. A., 13; *Chedda Lal v. Bhagwan Das*, I. L. R., 11 All., 234 followed.

A fictitious assignee of mortgagee rights from a judgment-debtor has not such an interest in discharging a debt as would give him the benefit of sections 69, 70 of the Contract Act.

S. A. 1118 of 1906.

CIVIL.

1908.

SIRAJ HUSAIN

*v.*

BULAKI RAM.

*Aikman J.*

CIVIL.

1908.

*February 8.*

STANLEY, C. J.

BURKITT, J.

CIVIL.

1908.

JANKI PRASAD  
SINGH.

v.

BALDEO PRASAD.

SECOND APPEAL against the decree of R. L. H. Clarke Esq., District Judge of Gorakhpur, confirming a decree of Babu Ladli Prasad, Munsif of Deoria.

Suit to recover a sum of money.

The facts of the case are as follows :—

On 19th August, 1900, one Baldeo Prasad executed a sale-deed in favour of plaintiff, of his mortgagee rights over certain lands in mauza Khampur. Bhikhari Teli, who had a money decree against Baldeo Prasad and others, in execution of his money decree attached the property transferred under the above sale-deed. The plaintiff objected in the execution department, under section 278, but his objection was dismissed. The plaintiff then filed a regular suit in the court of the Subordinate Judge, under section 283 of the Code of Civil Procedure, against both Bhikhari Teli and Baldeo Prasad and others, that he was the owner of the mortgagee rights transferred by the above sale-deed, and that the same was not liable to be sold in execution of his decree against Baldeo Prasad and others held by Bhikhari Teli. This suit was dismissed. There was an appeal to the District Judge, but the District Judge upheld the decision of the Subordinate Judge, on the 4th February, 1903. On the 18th June, 1903, the plaintiff paid Rs. 584-5-0, the money due to Bhikhari Teli under his decree. He then brought this suit to recover this sum from Baldeo Prasad and others. The suit was dismissed by the court below.

The plaintiff appealed.

*Gulsari Lal* (for *William Wallach*), for the appellant.

*Gobind Prasad* (with him *M.L. Agarwala*) for the respondents.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—We think that the decision of the courts below is correct. The plaintiff appellant has been able to establish no such relationship existing between him and the defendants, as would justify the payment of the money, which he now seeks to recover. It has been found by the courts below that the assignment made to him of the mortgagee rights of the defendants was fictitious and collusive, and consequently the judgment creditor of the assignors had a right to sell those mortgagee rights in execution of their decree. We do not think that section 69 or section 70 of the

Contract Act helps the appellants. As regards section 69, a party, who makes a payment on behalf of another, before he can recover the amount so paid, must show that he had an interest in making the payment. Their Lordships of the Privy Council, in dealing with the rights of parties making payments, observed in the case of *Ram Tahal Singh v. Biseswar Lal Sahoo and another* <sup>(1)</sup>:—"It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair and proper, according to the highest morality. To support such a suit, there must be an obligation expressed or implied to repay. It is well settled that there is no such obligation in the case, of a voluntary payment by A of B's debt." Now in this case, in view of the facts which have been found by the courts below, we can not discover that there was any obligation either expressed or implied on the part of the appellant, to pay the debt of the respondents. The case, therefore, does not fall within the purview of section 69 of the Contract Act. Nor does it, we think, fall within section 70. In the case of *Cheddu Lal v. Bhagwan Das* <sup>(2)</sup>, it was held by a Bench of this Court that by the use of the word "lawfully" in section 70 of the Contract Act, the legislature had in contemplation cases, in which a person held such a relation to another as either directly to create or as would justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. In his judgment, STRAIGHT, J.—observed "If the plaintiffs, as mere volunteers, chose to put their bonds into their pockets, and to pay a sum of money, not for the defendants but for themselves, that was their own look out and they can not now claim the benefits of section 70." We think upon the facts, therefore, that the payment made by the appellant was a purely voluntary payment and possibly was made as is suggested by the courts below with some sinister object, we dismiss the appeal with costs, including fees in this court on the higher scale.

*Appeal dismissed.*

(1) [1875] L. R., 2 I. A., 131.

(2) I. L. R., 11 All., 234.

CIVIL.

1908.

JANKI PRASAD  
SINGH

v.  
BALDEO PRASAD.

Stanley, C. J.

CIVIL.

1908.

February, 18.

BANERJI, J.  
RICHARDS, J.

NITA RAM

*versus*

THE SECRETARY OF STATE FOR INDIA.\*

*Land Acquisition Act (1 of 1894), section 49—Land for the full and unimpaired enjoyment of the house—when a part of the house.*

Whether or not land is or is not reasonably required for the full and unimpaired enjoyment of the house is a question of fact, depending upon the particular circumstances of each case. The land, which is not a house, manufactory or building in the literal sense, and which is not reasonably required for the full and unimpaired use of a house, manufactory or building, cannot be considered as part of the house, manufactory or building, within the meaning of section 49 of Act I of 1894.

The Government intended to acquire a portion of the land of the plaintiff for municipal purposes. The land to be acquired was at the end of a garden about 80 paces from the house. *Held*, that the land was not such as was required for the full and unimpaired enjoyment of the house.

FIRST APPEAL from a decree of L. G. Evans Esq., District Judge of Saharanpur.

The Government intending to acquire a part of the objector's land for the Municipality at Dehra-Dun, for constructing a reservoir, issued notice under the Land Acquisition Act. The land to be acquired was a portion of the garden in the objector's house. The objector put in an objection asking that the whole of the house and lands adjoining should be acquired as the acquisition of a part would interfere with his reasonably enjoying the rest. The Collector referred this point to the Civil Court. The District Judge inspected the locality, and came to the conclusion that the objection was not valid, as the plot to be acquired was at the end of the garden of Lala Nita Ram, and it was about 80 or 90 paces from his house.

The objector appealed.

*Sundar Lal*, for the appellant, contended that under section 49 of the Land Acquisition Act, the Government was bound to take the whole.

[BANERJI, J. The house means building.]

\* F. A. 43 of 1906.

The word was used in the same sense as it was used in the English Lands Clauses Consolidation Act, 8 vic. 1845, ch. 18, section 92 which runs as follows :—

No party shall, at any time, be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole of it.

*Major General Thomason v. The Collector of Naini Tal*, [1898] A. W. N., 85.

A garden, attached to the house, was appurtenant to the house, and the house and the garden must be acquired together.

[Richards, J.—I take the English authorities to decide that when the land is closely connected to the house that if a strip is acquired, the house cannot be enjoyed as it used to be enjoyed before that time.]

There was a presumption that a garden appurtenant to a house was a part of the house, and it was for the Crown to show that the portion proposed to be acquired was not required for the reasonable and unimpaired enjoyment of the house.

[Banerji, J.—We have to consider whether the portion acquired would interfere with the reasonable and proper enjoyment of the house.]

*Khairati Lal v. The Secretary of State for India*, [1889] 1. L. R., 11 All., 378.

*Cole v. West London Ry. Co.*, [1858] 28 L. J., Ch., 767.

The English Law had not been altered by the Indian Land Acquisition Act. The proviso requires the court to have regard to the fact whether the portion proposed to be taken was reasonably required for the unimpaired use of the house. If the Crown succeeded in showing that it was not so required, the court would not direct it to acquire the whole of the house and the garden.

*A. E. Ryves*, for the respondent, contended that the *onus* was on the appellant to prove that the acquisition of the land, sought to be acquired, would interfere with reasonable enjoyment of the house. No such proof having been given, the case failed.

The judgment of the Court was delivered by

XXII

CIVIL  
1908.

NITA RAM  
v.  
SECY. OF STATE.



CIVIL.

1908.

NITA RAM  
v.  
SECY. OF STATE.*Richards, J.*

RICHARDS, J.—This is an appeal from a decree of the District Judge of Saharanpur, upon a reference to him, under section 49 of the Land Acquisition Act. The Government were acquiring, under the powers conferred by the Act, a small piece of land at the end of a garden, occupied by Nita Ram. We expressly refrain from any expression of opinion as to the nature of Nita Ram's occupancy. That question is not before us. The piece of land is situate at one corner at the extreme end of the garden, which is used in connection with the house. The appellant contends here, as he clearly contended before the District Judge, that inasmuch as the piece of land was part of the garden, it was a part of the house, within the meaning of section 49 of the Land Acquisition Act, and that the owner of the property was entitled to insist that the Government should take the whole house and garden and not merely the particular bit of the garden, which was necessary for the special purpose, for which the land was being acquired. No evidence was offered by either side, but the learned District Judge went and inspected the locality himself. He clearly came to the conclusion that the particular piece of land was not reasonably required for the full and unimpaired use of the house, occupied by Nita Ram, and in this view, he decided that the Government was not bound to take over the entire house and garden. In our opinion, once he came to the conclusion, that the plot to be acquired was not reasonably required for the full and unimpaired use of the house, his decision was perfectly correct. A case has been cited to us in support of the contention of the appellant, that the entire house and garden should be taken. That is the case of *Khairati Lal v. The Secretary of State for India* <sup>(1)</sup>. In that case, the facts of which differed considerably from the facts of the present case, a Bench of this Court held, that where the Government were compulsarily acquiring certain out-offices in a compound, the owner could insist upon their taking the whole. That case, however, was decided under Act No. X of 1870, section 55. Section 55 of that Act is exactly the same as the first part of the 1st sub-section of section 49 of Act No. I of 1894. But sub-section 1 of section 49 of Act I of 1894 contains the following

(1) [1889] I. L. R., 11 All., 378.

additional provision :—" Provided also that, if any question shall arise as to whether any land, proposed to be taken under this Act, does or does not form part of a house, manufactory or building, within the meaning of this section, the Collector shall refer the determination of such question to the court, and shall not take possession of such land, until after the question has been determined. In deciding on such a reference, the court shall have regard to the question whether the land, proposed to be taken, is reasonably required for the full and unimpaired use of the house, manufactory or building."

In our judgment, the land which is not a house, manufactory or building in the literal sense, and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the house, "manufactory or building" within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact, depending upon the particular circumstances of each case. In our judgment, the appeal should be dismissed, and we accordingly dismiss it with costs. We direct that these costs should include Rs. 100, which we hereby fix as the fee of the respondent's counsel.

X.

*Appeal dismissed.*

FAHMIDA KHANAM

*versus*

JAFRI KHANAM.\*

*Mahomedan Law—Shia School—Bequest to one heir to the exclusion of others—more than one third of the estate.*

A mahomedan testator, governed by the Shia School of law, cannot make a valid bequest of all his property to one of his heirs to the exclusion of the other heirs, unless the heirs so excluded, consent to it subsequent to his death. But the bequest of one third of the estate will be valid, if made to one of the heirs, without the consent of the other heirs. *Cherachom v. Valia Pudiakel*, 2 Mad., H. C., 350; *Keramatul v. Nassan*, 2 *Morley's Digest*, 120.

\* S. A. 11 86 of 1907.

CIVIL.

1908.

NITA RAM

v.

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*Richards, J.*

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1908.

*February, 1.*STANLEY, C. J.  
BURKITT, J.

CIVIL.

1908.

FAHMIDA  
KHANAM

v.

JAFRI KHANAM.

SECOND APPEAL against the decree of Babu Bipin Bihari Mukerji, Judge, Small Cause Court, Cawnpore, exercising the powers of a Subordinate Judge, modifying the decree of Babu Raj Bihari Lal, Munsif.

Suit for possession of property.

The facts are that one Mahomadi Khanam was the owner of certain property, that she died on the 3rd October, 1905, leaving her husband Husaini, a son Kallu and two daughters, the plaintiff and the defendant, as her heirs, that Kallu died on 31st January, 1906, and Husaini died on the 7th February, 1906. The plaintiff sued for possession of half the property, both movable and immovable, left by her father and mother. The defence was that Husaini had transferred the whole property to the defendant by a will, dated the 2nd February, 1906, and that it was executed with the consent of the plaintiff. The court of first instance held that the will had been executed by Husaini, and was not a fictitious will, that it was executed without the plaintiff's consent, and was, therefore, under the Shia Law, by which the parties were governed, valid to the extent of one-third only. The lower appellate court held that the will, having been executed without the consent of the other heirs, was altogether void.

The defendant appealed.

*M. Ishaq Khan*, for the appellant, contended that the will was valid to the extent of one-third, and that the Shia Law differed in this respect from the Sunni Law, and relied upon

WILSON'S Anglo Mahomedan Law, 2nd Edition, p. 468.

AMEER ALI Mahomedan Law, 3rd Edition, Vol. 1, p. 485.

BAILLIE'S Digest of Mahomedan Law, Imamia, 2nd Edition, p. 244.

*Haribans Sahai*, for the respondents, submitted that the will in clear terms excluded the plaintiff, who was one of the heirs, from inheritance, and was, therefore, void. There was no difference between the Shiah and the Sunni Law in this respect. He relied upon

*Rani Khajooroonissa v. Mt. Roshan Jehan*, L. R., 3 I. A., p. 301.

AMEER ALI Mahomedan Law, vol. I., 2nd Edition, p. 486.

BAILLIE'S Digest, 2nd Edition, Mahomedan Law, Imamia, vol. II, 238.

*Ishaq Khan* was heard in reply.

The judgment of the Court was delivered by

STANLEY, C. J.—We think that the decision of the lower appellate court is correct. It appears to be well settled law that a Mahomedan testator, governed, as in this case, by the Shia School of law, cannot make a valid bequest of all his property to one of his heirs to the exclusion of the other heirs, without the consent of all the heirs, obtained subsequent to his death. The legacy in this case included all the testator's property, both movable and immovable, and from the will it appears that he intended to exclude one of his daughters from participation in his estate. The Sunni Schools agree in holding that a bequest in favour of an heir is invalid, but according to the Shia Law, it would seem that a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and that such a legacy would be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of all the heirs, given after and not before the death of the testator, has been obtained. Mr. Baillie in his *Digest of Mahomedan Law*, at p. 238, says:—"If a person should make a will excluding some of his children from their shares in his succession, the exclusion is not valid." Mr. Ameer Ali in his well-known work, at p. 486 of the last edition, observes that "the author of the *Sharaya* has laid down that when a testator has excluded one of his children from succession, and left the property wholly to others, his direction is entirely invalid, and the inheritance will be apportioned among the heirs, according to their legal shares." Again, Sir Roland Wilson in his *Digest of Anglo-Mahomedan Law*, after stating the rule that a bequest to an heir (not exceeding the legal third) does not require the assent of the other heirs, either before or after the death of the testator to render it valid, observes:—"The Shia view is certainly the most easy to reconcile with the text of the *Koran* (II, 178), which recommends the believer to 'bequeath a legacy to his parents and kindred in reason'," and then, referring to the existence of the difference between the two Schools and the doubt which existed on the question, says:—"This, however, was just before the publication of Baillie's translation of the *Sharaya*, which places the matter beyond doubt." In the latest work on the subject, namely, the *Institutes of Musal-*

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Stanley, C. J.

man Law, by Nawab Abdur Rahman, some of the principal texts upon the subject and also authorities are quoted at page 276 and following pages. The learned author of that treatise observes at p. 278 :—"The alienation of one-third to a portion of the heirs will not be legal, without the assent of the other heirs, subsequently to the death of the testator, because their benefits, already sufficiently secured by the law, are not within the reason of the rule on which testamentary disposition is established, and such a bequest would, as the certain occasion of family dissension, be opposed to public policy." He refers to the case of *Cherachom Vittil Ayisha Kutti Umah v. Valia Pudiakel Biathu Umah* <sup>(1)</sup>, in which the question is discussed. In another case to which he refers, namely, that of *Keramatul v. Nissan Bibi* <sup>(2)</sup>, it was held that if a man dispose of his property to his heirs and relations, to one more and to another less, or if he omit any of his relations, and after his death, the heirs and relations agree to the bequest, the will remains valid, otherwise the will only remains valid as to the bequest made to strangers, and invalid for the heirs and blood relations, who are to receive their respective shares, according to Mahomedan Law. See also *Rani Khujooroonissa v. Roushun Jehan* <sup>(3)</sup>. In view of the authorities, we think that the decision arrived at by the court below was correct, and we dismiss the appeal with costs.

(1) Mad., H. C. Rep., 350.

(2) Morley's Digest, at p. 120.

(3) L. R., 3 I. A., 291.

H. S.

*Appeal dismissed.*

## TIKAM SINGH AND ANOTHER

*versus*

## KHUBI RAM AND ANOTHER.\*

**Lambardar—power of—granting lease of co-parcenary land—for  
seven years.**

A lambardar has not the general power without the consent of co-sharers, to grant a lease of co-parcenary land beyond such term, as the circumstances of particular year or season may require. *Chattray v. Nawala and another*, I. L. R., 29 All., 20 followed. *Mukta Prasad v. Kampta Singh*, A. W. N., 1908, p. 277 distinguished. In this case a lease for seven years was set aside.

SECOND APPEAL from the decree of Babu Khetter Mohan Ghose, Additional Judge of Aligarh, confirming the decree of Babu Banke Behari Lal, Munsif of Hawali Aligarh.

The plaintiffs respondents sued for a declaration that a lease, dated 15th June, 1905, executed by Badam Singh, defendant No. 4, *lambardar*, in favour of defendants Nos. 1 to 3, in respect of 160 bighas and 10 biswas cultivatory holding, situate in mauza Edalpur, for a term of seven years, is null and void. Both the lower courts decreed the claim.

Defendants appealed.

*Parbati Charan Chatterji*, for the appellants. A lambardar can grant a lease of co-parcenary land, for the benefit of the co-sharers for a long term.

*Mukta Prasad v. Kampta Singh*, [1906] 3 A. L. J. R., 655 S. C., A. W. N., 1906, p. 277.

*Govind Prasad* (with him *Gulzari Lal*), for the respondent. It is found as a fact that the lease was granted for an inadequate rent; under the circumstances, the ruling, relied on by the appellants, does not apply.

*Chattray v. Nawala and another*, [1907] I. L. R., 29 All., 20 S. C., 3 A. L. J. R., 639, A. W. N., 1906, p. 257.

*Parbati Charan*, in reply.

The judgment of the Court was delivered by

STANLEY, C. J.—The suit, out of which this appeal has arisen, was brought by the plaintiffs, who are two of the co-sharers of a village, to have a lease, executed by the lambardar of the village in favour of the defendants, set aside. The defendants are also co-sharers of this village. The

\* S. A. 151 of 1907.

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1908.

February, 7.

STANLEY, C. J.  
BURKITT, J.

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*Stanley, C. J.*

lambardar and the other co-sharers were all made parties to the suit. The lease was for a term of seven years, and it is alleged and has been proved that it was made at an inadequate rent.

The courts below set it aside on, amongst other grounds, the ground that a lease by a lambardar for a term of seven years under ordinary circumstances could not be supported. This is a rule which has been acted upon by this Court for a number of years, and was followed by a Bench of this Court in the case of *Chattray v. Nawala* <sup>(1)</sup>. In that case, a Bench, of which one of us was a member, held that it was reasonable that a manager should have power to make temporary lettings, but the duties imposed upon him did not seem to admit of his executing in favour of a lessee, without the consent of the co-parcenary body, a lease for a long term of years, and then we pointed out that there was nothing to show that the exigencies of the season or time when the impeached lease was granted required that the grant should be made for so long a term as seven years. This decision followed previous rulings and is in no way inconsistent with the case of *Mukta Prasad v. Kamta Singh* <sup>(2)</sup>. In that case, it was held that a lambardar was competent to execute a lease of land for ten years, without reference to other co-sharers, where the land would not otherwise be let, and where it was for the benefit of the co-sharers that the land should be so let. In his judgment in that case, Sir ARTHUR STRACHEY, C.J., observed as follows:—"It appears that this land is of inferior quality, and it contained no *pacca* well for the purposes of irrigation. Upon the facts found by the court below, it appears that if the lambardar had not executed this lease for ten years, the land would not have been cultivated at all, and would have yielded no profit to the coparceners." It will, therefore, be observed that the circumstances of that case were exceptional. The rule appears to be, as we have stated, that a lambardar cannot of himself execute a lease of land beyond such term, as the circumstances of the particular year or season may require. We, therefore, dismiss the appeal with costs.

M. L. S.

*Appeal dismissed.*

(1) [1906] A. W. N., 257. (2) [1906] A. W. N., 277.

## BABU SINGH AND ANOTHER

*versus.*

## BEHARI LAL.\*

*Hindu Law—Debts—Son's liability for father's debts—Burden of proof—Immorality—Antecedent debts.*

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February 6, 7.

BANERJI, J.  
RICHARDS, J.

In a suit by a creditor against the sons of a Hindu debtor, the burden of proving that the debt was tainted with immorality lies on the son. It is not for the creditor to prove that the debt was contracted for payment of antecedent debts or that the family stood in need of money, and that the debt was taken for such necessity. *Maharaj Singh v. Balwant Singh*, 1. L. R., 28 All., 508, not followed. *Debi Dat v. Jado Rai*, 1. L. R., 24 All., 459, followed. General evidence of the profligacy of the father is not sufficient to exonerate the sons of the debtors from their pious duty to pay their father's debts.

FIRST APPEAL from the decree of Sheikh Maula Bakhsh, Subordinate Judge of Moradabad.

This was a suit for sale on eight different mortgages, executed on various dates for various sums. The first was executed by Rup Singh and Mahtab Singh, who were brothers, and were joint. The second and fourth were executed by Rup Singh and Musammat Indar Kuar—the mother of these two persons. The third was executed by Rup Singh, Mahtab Singh, and Indar Kuar. The fifth and sixth were executed by Mahtab Singh and Inder Kuar, and the seventh and eighth were executed by Mahtab Singh alone. Plaintiff prayed for sale of the property, mortgaged in each bond for its satisfaction. The defendants to the suit were two minor sons of Rup Singh, who were the sole appellants in the appeal, and the son of Mahtab Singh, who was also a minor. Their defence was that the debts, taken by their fathers, were incurred for immoral purposes, and they were not bound to pay the same. The Subordinate Judge decreed the suit.

Defendants (sons of Rup Singh) appealed.

*W. Wallach*, for the appellant discussed the evidence and urged that the plaintiff was bound to show that the debts in question had been taken by Rup Singh and Mahtab Singh either for payment of antecedent debts or for

\* F. A. 283 of 1905



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such purposes that their sons would be under a pious obligation to discharge them and the plaintiff had failed to show that. He relied on

*Maharaj Singh v. Balwant Singh*, [1906] I. L. R., 28 All., 508.

*Tej Bahadur Sapru* (with him *Sundar Lal*), for the respondent, submitted that the case in I. L. R., 28 All., was not consistent with the law as laid down by the Privy Council or by the Allahabad Court and other Indian Courts in a long array of cases. Moreover the judgment in 28 All., on this particular question was *obiter*. So far as the question of *onus* was concerned, there was no distinction in principle between the case of a creditor suing to enforce his debt, and that of a son suing to recover his ancestral property from a creditor of his father, who had purchased it in execution of decree, passed on his debt. On principle, the creditor, who was a stranger to the family, could not be and should not be expected to prove that his debtor was not an immoral man or that his debts were not taken for immoral purposes. The son should be the best person to prove that his father was immoral or that he took a loan for immoral purposes. He cited

*Hanuman Singh v. Gaura*, [1884] I. L. R., 6 All., 193.

*Chintamannan v. Kashi Nath*, [1889] I. L. R., 14 Bom., 320.

*Kishan Lal v. Garuruddhwaja*, [1899] I. L. R., 21 All., 238.

[RICHARDS, J.—Suppose a Hindu son sues, immediately after his father contracts a loan, that the loan has been taken for an immoral purpose, how would the ruling in 28 All., affect such a case].

According to that case, the property not having yet passed out of the hands of the family, the son would not be bound to prove immorality, but it would be for the creditor to establish that the debt was taken for a moral purpose. It was obvious that this could not be correct law. The case in

*Jamna v. Nain Sukh*, [1887] 9 All., 493.

was wrongly decided, and it was practically overruled by

*Nanomi Babuasin v. Modhun Mohun*, [1885] I. L. R., 13 Cal., P.C.

*Badri Prasad v. Madanlal*, [1893] I. L. R., 15 All., 75.

*Bhagbut Pershad v. Girja*, [1888] I. L. R., 15 Cal., 717.

*Debi Dat v. Jado Rai*, [1902], 24 All., 459. I. L. R.,

The case in 21 All., 238, was exactly a case like the present. It was also a suit by a creditor to enforce his mortgage

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against the debtor. It was quite consistent with 28 All. The ruling in that case was also opposed to a dictum of STANLEY, C. J., in

*Karan Singh v Bhup Singh*, [1905] I. L. R., 27 All., 16.

He then contended (after discussing the evidence) that evidence of general immorality was not sufficient. It should be proved by the son that the debts were taken for immoral purposes, and the creditor knew it. He relied on

*Hanuman Singh v. Gaura*, [1884] I. L. R., 6 All., 193.

*Kishan Lal v. Garuruddhwaia*, [1899] I. L. R., 21 All., 238.

*W. Wallach*, in reply, contended that the creditor's duty was to show that either the debts were entered into for the benefit of the family, or that he made such enquiries that the result of such enquiries would have led a reasonable and prudent man to believe that the money was required for the benefit of the family or for legal antecedent debts, when it would be the duty of a Hindu son to discharge it.

[BANERJI, J.—In my opinion, the remarks of the Judges on this point in 28 All., are *obiter*, and they are against the considered judgment in 21 All.]

He submitted that the remarks in 28 All., were not an *obiter*, and should be followed.

[BANERJI, J.—There is a long history of cases of this class. The case in 7 All., was wrongly decided. The only note of dissent from the established rule seems to have been sounded in 28 All.]

The judgment of the Court was delivered by

BANERJI, J.—The suit which has given rise to this appeal was brought by the respondent to recover money, due upon eight mortgage bonds, by sale of the property, hypothecated in each bond. There were two brothers, Rup Singh and Mahtab Singh, who formed members of a joint Hindu family. A portion of the family property was recorded in the name of their mother, Indar Kuar, and for this reason, she joined her sons in executing some of the bonds. Of the eight bonds in suit, two were executed by Mahtab Singh alone, two by Mahtab Singh and Indar Kuar, one by Rup Singh and Mahtab Singh, another by Rup Singh and Indar Kuar, another by Rup Singh, Mahtab Singh and Indar Kuar, and

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one by Rup Singh and Indar Kuar. Rup Singh and Mahtab Singh being dead, the suit was brought against their sons, who disputed the claim mainly on the ground that the debts, in respect of which the eight bonds were executed, had been incurred by Rup Singh and Mahtab Singh, for immoral purposes, and that the interests of the sons in the family property were not, therefore, liable. This plea was over-ruled by the court below, which was of opinion that it had not been proved that the debts were tainted with immorality. That court accordingly made a decree in favour of the plaintiff. It is admitted that the decree as framed is not strictly accurate. It purports to direct the sale of all the property mortgaged in all the eight bonds, for the total amount secured by those bonds, whereas the property, mortgaged in each bond, was liable only for the amount of that bond. This is what the plaintiff claimed in his plaint. The learned advocate for the respondent concedes that in this respect the decree of the court below must be varied.

The present appeal has been preferred by the sons of Rup Singh alone. The son of Mahtab Singh has submitted to the decree. It is contended, on behalf of the appellants, that it has been established that the debts in question were incurred for immoral purposes, except the amount of one bond, namely, that for Rs. 400-, dated the 25th of March, 1898. In regard to the amount of that bond, it has been shown that it was borrowed for payment of Government revenue which was actually paid, and Mr. Wallach fairly concedes that as regards this bond, he can urge nothing on behalf of the appellants.

As for the last four bonds which were executed by Mahtab Singh, and to two, of which his mother Indar Kuar was a party, the son of Mahtab Singh has taken no exception, but as said above, the decree must be varied to this extent that it should direct that the amounts of those bonds should be recovered by sale of the property, hypothecated in each of them, so that when the decree is so varied, the appellants will have no reason to complain.

There remain then, the bonds, dated the 5th, of June 1896, for Rs. 2400, that dated the 22nd of April, 1897, for Rs. 900, and that dated the 25th of April, 1897, for Rs. 200. As to these the learned counsel for the appellants contends that it was for the plaintiff

to establish that the debts were incurred for family necessities, and that the plaintiff made such enquiries, as would lead a reasonable man to believe that the money was required for purposes of the family or for payment of antecedent debts which, it would be the pious duty of a Hindu son to discharge. For this contention, he relies on a recent ruling of a Bench of this Court in, *Maharaj Singh v. Balwant Singh* <sup>(1)</sup>, and specially on the following passage in the judgment at p. 541, "We may say in passing that in a case in which a creditor is endeavouring to establish a claim, under a simple hypothecation bond, given by a Hindu father, having a limited interest only, against his sons, it appears to us to be not unreasonable to require proof on the part of the creditor, that before he entered into the transaction, he at least made such reasonable enquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family". With regard to this passage, it appears to us, and as the head note of the report shows, that it was not necessary for the purposes of that case to decide the question, whether the burden of proof lay on the creditor. Furthermore, we find that Mr. Justice BURKITT, in delivering judgment in the case of *Kishan Lal v. Garuruddhwaja Prasad Singh* <sup>(2)</sup>, was clearly of opinion that the *onus* did not lie on the creditor. At page 240, our learned brother observed:—"Had it been proved that the debt had been contracted for immoral purposes, and that the person who advanced the money was aware of the purpose, for which it was being borrowed, the son would not have been liable. There is, however, not a scrap of evidence to show that the debt, which formed the consideration for the bond in suit, was contracted for any such purpose". In the full Bench case of *Karan Singh v. Bhup Singh* <sup>(3)</sup>, the learned Chief Justice, in delivering the judgment of the Court, stated the law on the subject to be as follows:—"It is not necessary, in order to establish a son's liability for his father's debt, that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes, or was such a

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(3) [1904] I. L. R., 27 All., 16.

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debt as does not fall within the pious duty of the sons to discharge". We think that this view is in consonance with the rulings of their Lordships of the Privy Council. We need only refer to the following observations of their Lordships in the well-known case of *Nanomi Babuasin v. Modhun Mohun* <sup>(4)</sup>:—"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or *against his creator's remedies for their debts*, if not tainted with immorality." In our judgment, the burden of proof lies on the son, and not on the creditor, and we are of opinion in concurrence with the decision in *Debi Dat v. Jadu Rai* <sup>(5)</sup>, that the view taken in the case of *Jumna v. Nain Sukh* <sup>(6)</sup> can no longer be supported.

We have carefully considered the evidence in this case. In our opinion, it has not been established that the debts in question were incurred for immoral purposes. The bond, dated 5th June, 1896, for Rs. 2,400, recites that Rs. 2,002-2-0 out of that amount was left with the creditor, for payment to one Mohan Lal. It has been fully proved that this payment was actually made, and was made in discharge of prior bonds, in favour of Mohan Lal, dating as far back as 1899. It was alleged that the debts, in favour of Mohan Lal, had also been incurred for the purposes of a prostitute, in the keeping of Rup Singh. But we find from the evidence of the prostitute herself, that she had no connection with Rup Singh, when the early debts of Mohan Lal were incurred. We are, therefore, unable to accept the statements of the witnesses, who have deposed that the debts, in favour of Mohan Lal, had been incurred for purposes of immorality. A prostitute named Nauratan was produced who deposed in regard to Rs. 400 the balance of the amount of the bond for Rs. 2,400, that it was paid over to her. The lower court disbelieved this witness, and we see no reason to come to a different conclusion as to her credibility. Her statements are too vague to be accepted. On the contrary, Hori Lal, witness for the plaintiff, proves that this sum of Rs. 400 was appropriated towards family expenses.

(4) [1885] I. L. R., 13 Cal., 21. (5) [1902] I. L. R., 24 All., 459.

(6) [1887] I. L. R., 9 All., 493.

As to the bonds for Rs. 900 and Rs. 200, dated respectively 22nd April, 1897, and 25th April, 1897, they appear to represent one transaction, as both of them were registered on the same date, that is, on the 3rd of May, 1897. Nauratan says that Rs. 750 out of the amount of these bonds, was paid to her for the expenses of the tonsure ceremony of her son by Rup Singh, she says that this money was paid to her by the plaintiff at the house of Rup Singh at Kanderki. It appears, however, from the endorsement of the Sub Registrar, made on the bonds that at the time of registration, Rs. 764 and odd was paid in cash at Moradabad, in the office of the Sub Registrar. The statement of the witness, therefore, that it was paid to her at Rup Singh's house by the plaintiff, is clearly untrue. We have, on the other hand, evidence to show that the marriage of the daughter of Rup Singh was celebrated about that time, and that the year 1897 being a year of scarcity and famine, there was greater necessity for borrowing money in that year than in other years. The learned Subordinate Judge did not believe the witnesses, adduced to prove that all these debts had been incurred for purposes of immorality. He says that they impressed him as being tutored witnesses, and partisans of the defendant's friends. We have not the advantage which the learned Subordinate Judge had of hearing the witnesses, and seeing their demeanour, and nothing has been shown to us, to justify our differing from the conclusion, at which he arrived as to the credibility of these witnesses. It is true that there is some general evidence that Rup Singh and possibly Mahtab Singh were profligates. But even if this evidence be believed it is not sufficient, as observed in the case of *Kishen Lal v. Garuruddhwaja Prasad* (7), at page 240 and in *Chintamanrao Mahendale v. Kashi Nath* (8), to exonerate the sons of the debtors, from their pious duty, to pay their father's debts.

For these reasons, we are of opinion that the appeal has no force. As we have said in an earlier part of this judgment, the decree of the court below is not strictly correct, and is not in conformity with the prayer contained in the plaint. We, therefore, vary the decree so far that we direct that the amount of each bond, together with costs proportionate to that amount, and interest thereon up to the date fixed for

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(7) [1899] I. L. R., 21 All., 238.(8) [1889] I. L. R., 14 Bom., 320.

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*Banerji, J*

payment, be realised by sale of the property, hypothecated in the bond, relating to that amount, and we order that these amounts be calculated and specified in our decree. We extend the time for payment of the decretal amount to the 1st of August, 1908. As the rate of interest in some of the bonds was very high, we direct that no further interest shall be charged, after the date fixed for payment mentioned above. The respondent will get one-half of his costs of this appeal in calculating which fees will be charged on the higher scale. In other respects, we affirm the decree of the court below.

T. B. S.

*Decree modified.*

RAM NIWAZ AND OTHERS

*versus*

DAKHO AND ANOTHER.\*

CIVIL.

1908.

*February, 11.*BANERJI, J.  
RICHARDS, J.

*Pre-emption—Wajib-ul-arz—Construction—Hindu Widows' brother—not entitled to pre-empt—purchaser—estopped from denying the sale.*

A *wajib-ul-arz* of a village gave a right of pre-emption to the brother of the vendor and then to co-sharers. Further on it, provided that a Hindu widow, succeeding to her husband, would have no right to sell to her brother or father. *Held*, that the *wajib-ul-arz* must be read as a whole, and the brother of a Hindu widow had no right to pre-empt and could not resist a claim by a co-sharer for pre-emption.

It does not lie in the mouth of the person purchasing the property, in violation of the terms of the *wajib-ul-arz* to say that there has been no sale.

FIRST APPEAL from a decree of Baboo Alopi Prasad, Subordinate Judge of Saharanpur.

Suit for pre-emption, based upon the terms of a *wajib-ul-arz*, which ran as follows :—

A share-holder, wishing to transfer his property, should in the first place offer it to his own brother, and in case of his refusal, all the share-holders shall be entitled to take it.....After the death of the owner and in the absence of a male issue, his wife shall, provided she does not take a second husband, be the owner with the power to sell and mortgage the property, but she shall not have power to transfer the property of the deceased to her father, brother or paternal relations.

Mussammat Dakho widow of Kalian Singh, sold a part of her husband's property to her brother, Sundarlal respondent.

F. A. 6 of 1906.

ent no. 2. The plaintiffs who were co-sharers in the village brought this suit for pre-emption. The court below dismissed the suit.

Plaintiffs appealed.

*W. Wallach*, for the appellants.

*Motilal Nehru* (for *J. N. Chaudri*), for the respondents.

The judgment of the Court was delivered by

BANERJI, J.— This appeal arises in a suit for pre-emption and raises a somewhat novel question. The vendor is a Hindu widow and the purchaser is her brother. The plaintiffs, who are co-sharers in the village, claim pre-emption on the ground that the purchaser is a stranger and they as co-sharers are entitled to pre-empt the property in question, under the terms of the *wajib-ul-arz*. The defendant vendee resists the claim on the ground that being the brother of the vendor, he has a superior right of pre-emption. The *wajib-ul-arz* provides that in the case of a sale by co-sharer, the first right of pre-emption would be in the uterine brother of the vendor, and the next class of pre-emptors would be co-sharers in the village. But there is a further clause in the *wajib-ul-arz* that a Hindu widow succeeding to her husband in the absence of male issue would have full powers of sale, but would not be competent to sell to her brother or father. We must read the *wajib-ul-arz* as a whole, and under this *wajib-ul-arz*, a brother of a Hindu widow has no right of purchase. This is a limitation upon the right of pre-emption of brothers, as provided in the earlier part of the *wajib-ul-arz*, and shows that the brother of a widow was not intended to be included in the category of pre-emptors of the first class. If the brother of the vendor in this case was not entitled to purchase, he had certainly no right to pre-empt, and as he has no right of pre-emption, he has no right superior to that of the plaintiffs, who, as co-sharers, are certainly entitled to pre-empt.

It is next contended that there was no sale in respect of which the plaintiffs might claim pre-emption. It does not lie in the mouth of a person who has in fact purchased the property, in violation of the terms of the *wajib-ul-arz* to say that there has been no sale. There being in fact a sale, the

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*Banerji, J.*



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*Banerji, J.*

plaintiffs have a right of pre-emption, and the defendant vendee has no right superior to that of the plaintiffs. Consequently the plaintiffs were entitled to the decree, which they sought. We, accordingly, allow the appeal, set aside the decree of the court below, and make a decree in the plaintiffs' favour, subject to their paying the price, mentioned in the sale-deed, within two months from this date. In the event of the plaintiffs' failure to pay the pre-emptive price, within the time fixed, the suit shall stand dismissed with costs. If the pre-emptive price be paid, the plaintiffs will be entitled to their costs in this Court, and in the court below.

*Appeal decreed.*

## PRIVY COUNCIL.

RAJA RAI BHAGWAT DAYAL SINGH AND OTHERS  
*versus*  
DEBI DAYAL SAHU.

*Champany—Sale deed in respect of property subject to litigation—Non-payment of part of consideration—public policy—Hindu Law—transfer by a woman—burden of proving genuineness of transaction—Ratification—Acts not done on behalf of ratifier—sale without necessity—mesne profits recoverable by reversioner.*

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1908.

*January 24.*

LORD ROBERTSON,  
LORD COLLINS,  
SIR ARTHUR  
WILSON.

The second and third plaintiffs, who succeeded to a certain estate as reversioners, executed, in favour of the first plaintiff a sale deed conveying certain villages. Under the sale deeds only Rs. 600 were to be paid down and the balance Rs. 46,000, was to be paid when the property was recovered. *Held* that this did not make the transaction contrary to public policy. The question of whether the transaction was unfair as between the assignor and assignee could not be raised where the assignors joined the assignees as plaintiffs in the suit.

*Held* further that the law of champerty as applicable in England did not apply in India.

One who claims title under a conveyance from a woman with the usual limited interest, and who seeks to enforce the title against reversioners is always subject to the burden of proving not only the genuineness of the transaction but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity. This burden lies the more heavily on one who comes into court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

Ratification in the proper sense of the term, as used with reference to the law of agency is applicable only to acts done

on behalf of the ratifier. A woman, with a limited interest, could not, by acts *ex post facto*, charge upon the estate which she represents, obligations not originally binding upon it.

*Held* also that the claim for mesne profits was well founded the defendants having been in possession of the property under deeds of sale which were not good as such.

APPEAL from a decision of the High Court of Bengal.

Suit for possession. The Subordinate Judge of Ranchi decreed the suit in part. The High Court dismissed the suit.

Plaintiff appealed.

*Cohen*, K. C. and *Brown*, for the appellants.

*Sir Robert Finlay* and *L. DeGruyther*, for the respondent.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON.—These consolidated appeals relate to three villages, Chiyanki, Ganka, and Lalgara, and the substantial conflict is between the first appellant and the first respondent.

These villages with others were formerly the property of Ram Saran Singh, who, on his death, was succeeded by his infant son Narayan. Narayan died, while still an infant and unmarried, on the 7th August, 1879, and left surviving him his grand-mother, Jileb Kuar, an aunt, Aprup Kuar, widow of Ram Saran's brother, and a step-mother, Etraj Kuar, widow of Ram Saran. Of these, the grand-mother was heir to the boy's property, with the limited interest of a Hindu female inheriting from a male. The three ladies appear to have lived together down to the death of the grand-mother, which took place on the 22nd November, 1894.

On the death of the grand-mother, the inheritance again opened, and the second and third appellants, Bhanpertap Singh and Kirpa Narayan Singh were then the nearest male heirs of the deceased boy. Those two persons, on the 29th November, 1895, purported to sell the three villages in question to Rajah Bhagwat Dayal Singh, the first appellant. And that is the title under which he claims.

The first respondent, on the other hand, as the case is now put on his behalf, claims under two sale deeds executed, as it is now said, by or on behalf of the grand-mother, Jileb Kuar, the sales being, it is contended, justified by necessity so as to pass the whole inheritance. The first of these deeds bore date

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the 19th January, 1887. It purported to be a conveyance by way of sale, by the three ladies who have been mentioned, of the two villages Chiyanki and Ganka to the first respondent. The second deed was dated the 15th May, 1891. It purported to be executed by the same three ladies in favour of one Hodges, and to convey to him by way of sale the village Lalgara. Hodges afterwards conveyed to the first respondent.

The present suits were brought on the 29th August, 1898, in the Court of the Subordinate Judge at Ranchi. The plaintiffs were the first appellant and the two persons from whom he purchased. The sole defendant in one suit and the substantial defendant in the other was the first respondent. The first suit related to the village Lalgara, the second suit to the villages Chiyanki and Ganka. The claim in each case was for possession and mesne profits.

The first question raised in the case and argued on the appeals was whether or not the sale by the second and third appellants to the first appellant was void in law, so as to pass no title, on the ground that it was champertous, or contrary to public policy.

For the respondents, it was boldly argued that, although the English law as to maintenance and champerty is not, as such applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that, that proposition cannot be supported. In three cases\* before this Board, a contrary doctrine has been laid down. In the last of those cases, full effect was given, under circumstances closely analogous to those of the present case, to an agreement which would certainly have been void if champerty avoided transactions in India.

It was further argued that the transaction in question was contrary to public policy and void on that ground, by reason of the provision as to payment of the purchase money by the first appellant to the second and third. The purchase money was fixed at Rs. 52,600, of which Rs. 600 was to be paid down and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In

\* *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 4 I. A. 23; *Kunwar Ram Lal v. Nil Kanth*, 25 I. A. 112; *Lal Achut Ram v. Raja Kazi Husain Khan*, 32 I.A. 113.

their opinion, the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

It was further said, and this was relied upon in the Courts in India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between the assignor and the assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case, the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present actions. Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail.

The second question that has to be considered is whether the respondent has shown a good title in himself by purchase from Jileb Kuar, the grand-mother; under the two sale deeds mentioned, and under such circumstances as to make that title effectual against the reversionary heirs.

The Subordinate Judge, who tried the cases, held that the conveyances were not good, but he allowed, in favour of the first respondent, certain sums which he considered to have been advanced for purposes of legal necessity; and whilst giving a decree to the appellants and plaintiffs for possession of the property, he made that decree conditional upon the payment to that respondent of the sums held to have been advanced for legitimate necessities. On the argument of these appeals, Mr. Cohen, for the appellants, accepted the propriety of this mode of dealing with the case, and assented to the allowance so made by the Subordinate Judge.

The High Court, on appeal, differed from the first Court, and held that the necessity for the sales in question was established.

Before dealing further with this question, it must be noticed that the case now contended for is not the case raised on the pleadings and relied upon at the trial. The respondent in his written statement alleged a title derived, not from Jileb

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Kuar, but from Etraj Kuar. He said, in paragraph 21, that "Etraj Kuar was no heir to Narayan Saran Singh, and that she acquired an absolute right by adverse possession;" in paragraph 23 "that it is not true, as the plaintiffs allege, . . . that on the death of Narayan Saran Singh, Jileb Kuar succeeded as heir and was in possession up to her death; the fact is . . . that Etraj Kuar alone was in such possession until her death," and in paragraph 25 that "Jileb Kuar and Aprup Kuar never took the estate of Narayan Saran Singh as heir, and the fact of their joining in the documents as persons executing the deeds of sale and the prior deeds was a matter of form of evidence of members dependent for maintenance on Etraj Kuar, and was merely a surplusage"; and it was added in paragraph 26 that "even if Jileb Kuar were to have taken the estate . . . by inheritance, she would take it in absolute estate . . . under the provisions of Mitakshara Law, and so also if she was made a co-sharer by Etraj Kuar in Etraj Kuar's right." In his evidence given at the trial, the respondent endeavoured to maintain the case that his title was derived from Etraj Kuar and was good on that account.

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienor did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

These considerations apply with special force to the present case. The earlier transactions of the first respondent were with Etraj Kuar, and there is no satisfactory evidence to show that Jileb Kuar, the real owner, took part in them, or authorised them in any way.

It was argued however that, if Jileb Kuar was not shown to have authorised the earlier transactions, she had ratified them

by being a party to the later documents and particularly the two sale deeds. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognised in section 196 of the Indian Contract Act. Looking to the substance of the matter, it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could, by acts *ex post facto*, charge upon the estate which she represents obligations not originally binding upon it.

With regard to the first of the sale deeds now in question, when the details which make up the consideration come to be examined, it appears that they include one sum of Rs. 1,500 which the Subordinate Judge credited to the first respondent in the manner already explained. Apart from this sum, the great bulk of the consideration for this sale deed consists of debts originally incurred by Etraj Kuar with accretions of interest and compound interest. Their Lordships are of opinion that this deed was correctly estimated by the Subordinate Judge.

The case as to the second sale deed is not quite so simple. With regard to it, the Subordinate Judge gave credit to the first respondent for considerable sums as having been advanced for real necessities. As to the rest of the consideration for that deed, he held that necessity had not been established. In coming to this conclusion, he took into account not only the more general considerations already referred to, but also certain circumstances peculiar to the case—that the lady who alone had any power to convey was old, and had no independent advice to guide her, and that the first respondent was in a position to exercise considerable influence over her affairs. Their Lordships think the Subordinate Judge was justified in taking all these matters into his consideration; and they see no sufficient ground for rejecting his conclusion.

There remains one other point for consideration. The plaintiffs claimed not only possession but mesne profits. The Subordinate Judge rejected the latter claim. Their Lordships are of opinion that, as the deeds of sale are not good as such, the claim for mesne profits is well founded. In argument, it was conceded that on the other side of the account, interest at

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6 per cent should be allowed on the sum credited to the first respondent. The amount thus to be allowed on the one side and on the other can be adjusted in execution proceedings.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, that the decrees of the High Court should be discharged with costs to be paid as regards the first decree by the present respondents other than Sowton, and as regards the second decree by the first respondent, that the decrees of the Court of the Subordinate Judge should be discharged, and that instead thereof it should be ordered that upon the first appellant paying to the first respondent the sums found in favour of the latter by the Subordinate Judge, with interest at 6 per cent per annum, the first appellant do recover possession of the property in suit, together with mesne profits to be ascertained in execution proceedings, and costs to be paid by the first party defendants in the first suit and by the sole defendant in the second suit.

The respondents other than Sowton will pay the costs of these appeals.

Solicitors for the appellants : *Withal and Withal.*

Solicitors for the respondents : *T. L. Wilson & Co.*

*Appeal decreed.*

SADA SHANKAR

*versus*

HARI SHANKAR.\*

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1906.

February 26.

BANERJI, J.  
RICHARDS J.

*Religious Endowment Act, (XX of 1863), section 14—Power to appoint a new trustee—Code of Civil Procedure (Act XIV of 1882), section 539.*

Section 14 of the Religious Endowment Act only empowers a court to direct the specific performance of any act by the trustee, manager or superintendent or to award damages or costs against such trustee, manager or superintendent and to direct their removal. It confers no power on the court to appoint a new trustee, manager or superintendent, for which the proceedings provided for by section 539 of the Code of Civil Procedure must be resorted to.

FIRST APPEAL from a decree of G. A. Paterson Esq., District Judge of Benares.

The material facts appear from the judgment. The court below decreed the suit in part.

Plaintiff appealed.

*Tej Bahadur Sapru* (with him *M. M. Malaviya*), for the appellant.

The respondent was not represented.

The judgment of the Court was delivered by

BANERJI, J.—This was a suit under section 14 of Act XX of 1863, for the removal of the defendant from the office of manager and superintendent of a temple and of the property appertaining to the temple on the ground of misfeasance, breach of trust and neglect of duty. The plaintiff is the son of the maker of the endowment, and he asked in addition to an order for the removal of the defendant from his office, for an order appointing another trustee in his place. The learned Judge has found that there was ample evidence of the defendant's misfeasance, neglect of the duty, breach of trust and he has directed the removal of the defendant from his office of manager and superintendent. He was, however, of opinion that under the power conferred on him by section 14, and in view of the provisions of section 22 of the Act, he had no power to

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\* F. A. 127 of 1906.



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appoint a new trustee in the place of the trustee removed. The result of this decision is that the trustee has been removed, and there is no trustee to carry out the objects of the trust.

The only question raised in the appeal is whether the learned Judge had power to appoint a new trustee. We think the view taken by the learned Judge is correct. All that section 14 empowers a court to do is to direct the specific performance of any act by the trustee, manager or superintendent, or award of damages and costs against such trustee, manager or superintendent, and to direct the removal of such trustee, manager or superintendent. It confers no power on the court to appoint a new trustee, manager or superintendent. If it is necessary to invoke the aid of the court for the purpose of appointing a new trustee, the proceedings provided for by section 539 of the Code of Civil Procedure, seem to be the course which must be resorted to. It would be, no doubt, desirable to appoint a new trustee or trustees in the present case, but under the provisions of the Act, under which these proceedings were instituted, neither the court below nor this court in appeal has power to appoint a new trustee. We, accordingly, dismiss the appeal but make no order as to costs, as the respondent is not represented.

*Appeal dismissed.*

[Cf. *Sheoratan Kunwari v. Ram Pargash*, I. L. R., 18 All., p. 227 Ed.]

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1908.

*February, 4, 5.  
March, 11.*

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

RAM DIN

*versus*

BHUP SINGH AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), section 43—suit for redemption decreed—Second suit for surplus profits recovered by mortgagee during mortgage not maintainable—Effect of Article 105, Limitation Act (XV of 1887).*

Article 105 of the Limitation Act must not be construed so as to conflict with the provisions of section 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by a suit for redemption. Where a mortgagor brings a suit and obtains a decree for redemption, he cannot maintain a second suit for recovery

\* F. A. F. O. 30 of 1907.

of surplus collections made by the mortgagee, during the period of the mortgage, section 43 of the Code of Civil Procedure being a bar to the maintenance of that suit.

*Per KARAMAT HUSAIN, J.*—The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage debt has been satisfied, is inconsistent with the principles on which the law of redemption is based.

APPEAL against the order of C. D. Steel Esq., District Judge of Shahjahanpur, reversing the decree of Pandit Kunwar Bahadur, Subordinate Judge of Shahjahanpur.

A suit was brought for the redemption of a usufructuary mortgage of the year 1855 in 1904. The allegation in that suit was that the mortgage had been discharged from the usufruct of the property. The suit was decreed on March 23, 1905, the court finding that the mortgage had been satisfied sometime in 1873. The mortgagors obtained possession on March 13, 1906. The suit which gave rise to the present appeal was brought for the recovery of surplus profits from the mortgagee from 1874 to the date of the delivery of possession. The defence, *inter alia*, was that the suit was barred by section 43 of the Code of Civil Procedure. The court of first instance dismissed the suit as barred by section 43, Code of Civil Procedure. On appeal the District Judge reversed the Subordinate Judge's decree and remanded the case under Section 562, Code of Civil Procedure. His reasons were as follows :—

The plaintiff's cause of action for suing for mesne profits was not then complete. The cause of action for possession of the property was its retention on 6th September 1873. The cause of action for mesne profits was subsequent to that *viz.* the realizations of the profits accruing after that date. It is said that to allow the present suit to be brought would be to sanction a multiplicity of suits. I do not think so. The way was merely cleared for the present suit by the former one, and a different decision of the former case might have even rendered this one unnecessary. In the former one, the whole of the accounts had to be gone into. They were merely examined so far as to ascertain whether at the time of the suit brought, the mortgages had been satisfied. That was all that was required by the plaintiff's claim.

In the course of that enquiry the plaintiffs became aware that a second cause of action had been given them *viz.* that subsequent to 1280 F. the defendant had illegally realized rents etc. He then is entitled to sue for

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these within the time allowed by Art. 105 Sch. II Limitation Act XV of 1877 *i.e.* for money realized after 1st October 1884. I therefore allow this appeal with costs and remand the case under section 562 Civil Procedure Code.

Defendant appealed.

*J. N. Chaudri*, for the appellant contended that the first suit was a suit for redemption and the decree was a redemption decree. The plaintiffs ought to have included the claim for profits in that suit. The liability to account for the gross receipts arose out of the relation of mortgagor and mortgagee. He referred to sections 76(h) and 92 of the Transfer of Property Act. The mortgagee, remaining in possession after the mortgage had been satisfied, was not a trespasser. He retained the character of a mortgagee and was a sort of a *trustee for the mortgagor* for the profits and, as such, was accountable to him. The leading case on the point was

*Baloji v. Jumangonda*, [1869] 6 Bom. H. C. R. A. C. J., 97.

The later cases were all to the same effect :

*Vinayak v. Dattatrya*, [1902] I. L. R., 26 Bom., 661.

*Satyabadi Behari v. Harabuti*, [1907] I. L. R., 34 Cal., 223.

*Rukhminibai v. Vankatesh*, [1907] I. L. R., 31 Bom., 527.

*Kashi Pershad v. Bajrang Pershad*, [1907] 4 A. L. J. R., 763.

*Madan Mohan Malaviya*, for the respondent, contended that the cause of action for the present suit was that the mortgagee had received certain money which should have come to the pockets of the mortgagor. In the previous suit the cause of action was quite different. It was that the mortgagee had retained the property after the satisfaction of the mortgage. There was no difference between suits for mesne profits and suits for surplus profits. It had been held that a second suit for mesne profits could be maintained after a decree for possession had been passed. Article 105 of the Limitation Act indicated that a suit for surplus collections made by the mortgagee could be maintained after the mortgagor re-entered on the mortgaged property. A mortgagor was not bound to include the claim for surplus profits in the suit for redemption. He cited the following cases.

*Mon Mohan v. Secretary of State* [1890] I. L. R., 17 Cal., 968.

*Ramdayal v. Madan Mohan Lal* [1899] I. L. R., 21 All., 426.

*Maksud Ali v. Nargis Dye* [1893] I. L. R., 20 Cal., 322.

*Amanat Bibi v. Imdad Husain* [1886] 14 I.A., 16.

*Baboo Gaur Kishan v. Sahay Fakir Chand* [1867] 7 W. R. 364.

*J. N. Chaudri*, in reply, submitted that the frame of the plaint must be considered. The suit was for profits for two periods which might be roughly divided into (a) from 1874 to 1904, past profits and (b) from 1904 to 1906, *i.e.*, subsequent profits. As to (a) it was clear that even assuming the mortgagee retained the property as a trespasser the suit would be barred under section 43, Code of Civil Procedure. The cases cited all related to *subsequent* profits, and in the case of such profits it was held that a suit would not be barred. The *corpus* and the profits were in the eye of the law identical, and so a suit for mesne profits, realised prior to its institution and not claimed along with the suit for possession would be barred. There was no distinction in principle between a mortgagee and a trespasser in respect of such a suit. As to (b) a suit for redemption was a true suit for accounts between the mortgagor and the mortgagee and so when a suit was brought for redemption the mortgagee was bound, upon the accounts being taken, in case of a balance against him, to pay the balance. If that were not so there would be a multiplicity of suits which would be contrary to the spirit and intendment of the law. Art. 105, Sch. II, Limitation Act was not applicable. The language of that article implied that the mortgagor had entered into possession under some arrangement with the mortgagee. The suit was, therefore, barred by the principle of *res-judicata*.

The following judgments were delivered.

AIKMAN J.—This is an appeal from an order of the learned District Judge of Shahjahanpur, remanding a case under the provisions of section 562 of the Code of Civil Procedure. The plaintiffs, who are respondents here, brought a suit against the appellant in the Munsif's Court, for redemption of a usufructuary mortgage. They obtained a decree and were put in possession of the mortgaged property, on 13th March, 1906. They subsequently brought the suit, out of which this appeal arises, to recover from the appellant Rs. 5,000, on account of surplus collections alleged to have been received since 1874, when the mortgage debt was discharged by the usufruct of the property. The suit was filed in the Court of the Subordinate

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Judge. It was dismissed by him on the ground that it was barred by the provisions of section 43, Code of Civil Procedure. On appeal by the plaintiffs, the learned District Judge held that the suit was not barred, and remanded it for decision on the merits. It is against that order of remand that the defendant has preferred this appeal.

In my opinion, the appeal must be allowed. The learned District Judge has written a careful judgment, but I cannot agree with the conclusion at which he has arrived. He says "The cause of action, on the 17th December, 1904, the date of the institution of the case in the Munsif's Court, was the retention of the property. The whole claim which the plaintiff was entitled to make then on that cause of action was to say "give me possession of the property." This is a view which I cannot accept.

The plaintiff had another remedy which he was not only entitled to sue for, but bound to sue for in the previous suit, and that was to have an account taken, and a decree passed for any surplus received by the mortgagee, after discharge of the mortgage debt. As remarked by JENKINS, C. J. in *Vinayak v. Dattaraya*(<sup>1</sup>), a redemption suit "has for its purpose the complete adjustment of the rights of the parties, and the decree, when properly framed, provides for matters even up to the time when it is ultimately carried into effect."

The decision in *Rukmin Bai v. Venkatesh* (<sup>2</sup>), *Satyabadi Behari v. Harabati* (<sup>3</sup>), and *Kashi Pershad v. Bajrang Pershad*, (<sup>4</sup>), are also in favour of the appellant, and we have not been referred to any case in which a suit like the present has been held to be maintainable. In the case of *Rukminbai v. Venkatesh* (<sup>2</sup>), the subsequent suit of the mortgagee was held to be barred either under section 13 or section 43 of the Code of Civil Procedure. Section 13 will not apply to this case, as the court which tried the previous suit was not a court competent to try the present suit. But the provisions of section 43 are sufficient to bar this suit.

The learned District Judge in support of the conclusion to which he came relies on Article 105 of the second schedule of

(1), [1902] I. L. R., 26 Bom., 661. (2) [1907] I. L. R., 31 Bom., 527.

(3) [1907] I. L. R., 34 Cal., 223. (4) [1907] 4 A. L. J. R., 763.

(2) [1907] I. L. R., 31 Bom., 527.

the Limitation Act, which prescribes a period of limitation for a suit by a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee and gives as the time from which the period begins to run the date "when the mortgagor re-enters on the mortgaged property." In my opinion, this article must not be construed so as to conflict with the provisions of section 43, Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption. For the above reasons, I would allow the appeal with costs.

KARAMAT HUSAIN, J.—The facts which led up to this appeal are, that a suit for redemption (No. 591 of 1904) was brought in the Court of the Munsif of Shahjahanpur. The plaintiffs in that suit did not claim any surplus collections, made by the mortgagee in possession nor did they obtain any permission to bring a separate suit for such collections. They got possession of the property in execution of the decree for redemption, on the 13th March, 1906, without any payment as it was found that the mortgage debt had been satisfied from the profits of the mortgaged property before 1280 *Fasli*.

On the 1st of May, 1906, the plaintiffs brought a suit for the recovery of the excess profits, realized by the defendant, after the satisfaction of the mortgage money, and before redemption. One of the pleas in defence was that section 43 Civil Procedure Code barred the suit. The court of first instance, accepting the plea, dismissed the suit. On appeal by the plaintiffs, the learned District Judge set aside the decree of the first court—and remanded the case under section 562, Civil Procedure Code. The lower appellate court came to the conclusion that section 43 Civil Procedure Code did not bar the suit, and that the cause of action for the surplus arose subsequently to that of redemption and was a distinct cause of action. The defendant has appealed to this Court. It is argued on his behalf that the cause of action for surplus profits in a redemption suit is not separate from the cause of action for the recovery of the possession of the property mortgaged and that the mortgagor in such a suit has only one single cause of action against the mortgagee in possession. This contention, I am of opinion, is perfectly

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sound. The comprehensive character of suits relating to mortgages and the obligation incumbent on litigants to see that the decree in them covers all rights, is well known, (*Vinayak v. Dattaraya*) <sup>(1)</sup>, and a mortgagor in a redemption suit has not only to claim possession where the mortgagee has it, but he has also to claim surplus collections, if any. His cause of action in a redemption suit is a single cause of action, and demand for the excess collections, if any, forms an essential part of his *whole* claim in respect of that cause of action and hence if the plaintiff in a redemption suit succeeds, the court has to pass a decree, ordering that an account shall be taken (section 92 of the Transfer of Property Act). Regarding the principle already stated, the learned Judges in the case of *Balaji v. Tamanganda*, <sup>(2)</sup> remark :—" In this case, the plaintiff, who claims under the mortgagor, sues to recover over-payments, on account of a mortgage which has been redeemed. We are of opinion that the claim which arose out of the cause of action when the suit for redemption was filed, was, that the plaintiff the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and secondly, to get back any sum over-paid, and that therefore, the first suit should have claimed both possession and the surplus, as required by section 7 of the Code of Civil Procedure which provides, that "every suit shall include the whole of the claim arising out of the same cause of action". The proper decree would have been to order payment of the surplus, on the ground that the mortgagees were trustees of the mortgagor and that the money in their hands belonged to them.

There in fact may be suits for redemption in which a demand for a surplus directly flowing from a settlement of accounts may be *co-extensive* with the *whole* claim of a mortgagor in respect of his cause of action to redeem. The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property and to hold that the cause of action for claiming excess collections accrues when the mortgaged debt has been satisfied, is inconsistent with the principles on which the law of redemption is based.

(1) [1902] I. L. R., 26 Bom., 661, 668. (2) [1869] 6 Bom. H. C. R., 97, 99

The question of accounts in a redemption suit must not be mixed up with the question of mesne profits in a suit for the recovery of immoveable property against a trespasser, for the position of a mortgagee in possession is very different from that of a trespasser. The possession of the mortgagee before redemption is possession for the mortgagor, and he becomes a trustee for the mortgagor after he has been paid." (Ashurner on Equity, p. 258). He has therefore to deliver possession of the mortgaged property, and to account for his gross receipts from the mortgaged property" (section 76 T. P. A.). The possession of a trespasser is of an adverse nature and section 44, Civil Procedure Code shows that the cause of action for mesne profits is distinct from that for the recovery of immoveable property. In India "the policy of the law has been to allow a plaintiff to enforce a claim for possession of land, and for mesne profits either in one suit or two, as he might think proper, but at the same time to induce him if there is no reason to the contrary, to dispose of his whole claim in one suit only". (*Kishori Lal Roy v. Sharat Chunder Muzumdar* <sup>(1)</sup>) quoted with approval in *Lalessor v. Janki Bibi* <sup>(2)</sup>. Such being the distinction between a claim for surplus collections in a redemption suit, and a claim for mesne profits in a suit in ejectment, the cases of *Mon Mohan v. The Secretary of State for India* <sup>(3)</sup>, and of *Ramdayal v. Madan Mohan Lal* <sup>(4)</sup>, which deal with suits for mesne profits have no bearing upon the case before me. *Maksud Ali v. Nargis Dye* <sup>(5)</sup>, *Amanat Bibi v. Imtali Husain* <sup>(6)</sup>, have also nothing to do with a suit for surplus profits brought after a suit for redemption.

It is contended on behalf of the respondent that article 105 of the Indian Limitation Act (No. 15 of 1877) provides three years limitation for the recovery of surplus collections, received by the mortgagee from the date when the mortgagor re-enters on the mortgaged property, and that this indicates that there can be a *separate* suit for excess collections. The article, in my opinion, contemplates a case other than that of redemption. When a mortgagor takes possession of the mortgaged property, not in execution of a decree for redemption but in some other

<sup>1</sup> [1882] I. L. R., 8 Cal., 593.      <sup>2</sup> [1892] I. L. R., 19 Cal., 615.

<sup>3</sup> [1890] I. L. R., 17 Cal., 968.      <sup>4</sup> [1899] I. L. R., 21 All., 425.

<sup>5</sup> [1893] I. L. R., 20 Cal., 322.      <sup>6</sup> [1886] 16 I.A., 106. S.C., I.L.R., 14 Cal., 308.

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way then article 105 applies. In *Baboo Gour Kishen Singh v. Sahay Fukeer Chand* (7), it was ruled that a suit for redemption does not debar the mortgagor from afterwards suing the mortgagee in possession for mesne profits, payable between the date of suit and the execution of the decree for redemption. In that case, the mortgagee, as has been observed by the learned Judges in *Satayabadi Behari v. Haravati* (8), had sued under Regulation I of 1798, while the scheme of the Transfer of Property Act is quite different. For the reasons given above, I would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed. The order of the learned District Judge, remanding the case under section 562, Code of Civil Procedure, is set aside, and the decree of the court of first instance is restored. The appellant will have his costs here and in the court below and the costs of this Court will include fees on the higher scale.

S. C. C.

*Appeal decreed.*

(7) [1867] 7 W. R., 564.

(8) [1907] I. L. R., 34 Cal., 223

## JAMBU PERSHAD

*versus*

## RUP CHAND.\*

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1908.

5th, March.

STANLEY, C. J.  
BURKITT, J.

*Jains—Custom of adoption of a married man of 23 years—Onus of proving invalidity—Senior widow can adopt—Junior widow's consent not necessary—Giving away a son by mother without permission of husband.*

Where a Jain widow adopted a married man of 23 years of age, and such adoption was challenged by the plaintiff and supported by the defendant who relied on a custom among the Jains permitting such adoption, *held* on the evidence that the custom had been established and that a married man may validly be adopted among the Jains. *Manohar Lal v. Banarsi Das*, I. L. R. 29 All., 495 followed. In Jain cases, it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation.

Where the plaintiff, who claimed to be the reversioner of a Jain, brought a suit during the widow's life-time, asking the court to declare that she had not adopted the defendant respondent and that if she had adopted him, his adoption was invalid, *held* that the *onus* lay on the plaintiff to prove the invalidity. *Brojo Kishoree Dassie v. Sreenath Bose*, 9 W. R., 463; *Sardar Singh v. Ram Kunwar*, A. W. N., 1902, p. 62, followed. *Tarinee Churn*

\* F. A. 32 of 1906.

*Chowdhry v. Sharoda Soonduree Dossee*, 11 W. R., 468; *Chowdhry Pudum Singh v. Koor Odley Singh*, 12 W. R., 1 P. C.; *Gooroo Prosunno Singh v. Nil Madhub Singh*, 21 W. R., 84, and *Hur Dyal Nag v. Roy Krishto Bhoomick*, 24 W. R., 107, distinguished. The principle, upon which the *onus* is fixed resembles that according to which a plaintiff who sues to set aside deeds, is bound not merely to prove his heirship but must give some evidence to impeach the deeds, before he can throw the *onus* of showing a better title on the defendant. *Tacoorden Tewarry v. Nawab Syed Ali Hossein Khan*, L. R. 11 A. 192. S. C. 21 W. R., 340.

A senior Jain widow can adopt a boy without the consent of her co-widow.

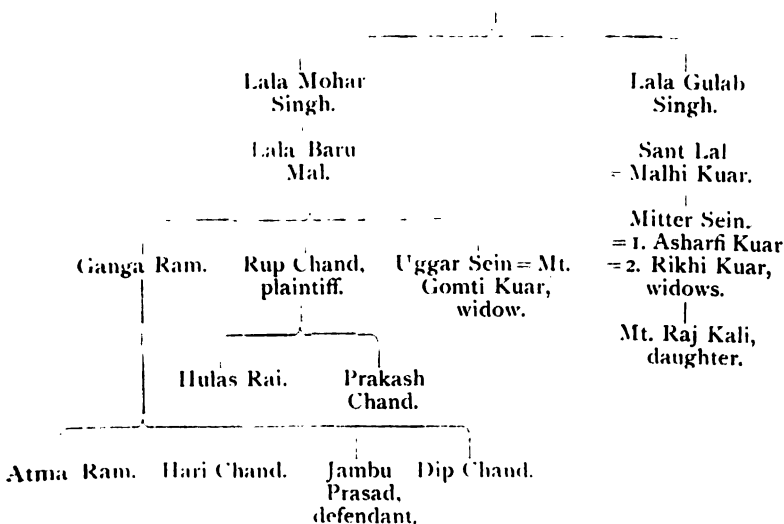
A widow may give her son in adoption without any permission, derived from her deceased husband. *Sri Balusu Gurulingaswami v. Sri Balusu Rama Lakshminna*, L. L. R., 22 Mad., 398, P. C., *Rudha Mohun v. Hardai Bibi*, L. L. R., 21 All., 460. *Raja Upendra Lal Roy v. Srimati Rani Prasanna Mayi*, 1 B. L. R., 221, referred to.

FIRST APPEAL from the decree of Babu Nihal Chand, Subordinate Judge of Saharanpur dated November 8, 1905.

Suit for declaration that Jambu Pershad was never adopted by Musammat Asharfi Kuar, and that if adopted, the adoption was invalid, and that the deed of adoption, dated the 14th of April, 1900, executed by Asharfi Kuar in favour of Jambu Pershad was null and void, and would not affect the plaintiff after her death.

The following pedigree is necessary to elucidate the facts and show the relationship of the parties who are Jains :—

LALA KHAIRATI RAM.



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Mitter Sein died in 1890, leaving him surviving Musammats Malhi Kuar, mother, Asharfi Kuar and Rikhi Kuar widows, and Raj Kali, daughter. He left considerable property, moveable and immoveable, and outstanding debts. The two widows succeeded him as heirs, but the name of Musammat Malhi Kuar was also recorded in revenue papers, along with those of the widows as against the zemindari property. In 1894, Musammat Rikhi Kuar, who was the junior of the two widows, acting in collusion with one Panna Lal, a brother of the senior co-widow, 'gave out' that she had adopted one Samandar Lal, the son of Panna Lal. Asharfi Kuar brought a suit to have it declared that Samandar Lal had never been adopted. The suit was decreed by the Subordinate Judge of Saharanpur, and on appeal, his decree was affirmed by the High Court. Subsequently in June, 1900, Raj Kali, the daughter of Mitter Sein died. Rikhi Kuar and Panna Lal again colluded and 'gave out' that she (Rikhi Kuar) was about to adopt the said Samandar Lal. As a counter-move, Asharfi Kuar, the senior widow of Mitter Sein, also 'gave out' that she also wanted to adopt a boy, her object being that Rikhi Kuar, the junior widow, should thus be prevented from giving publicity to the adoption of Samandar Lal. On the 14th of April, 1900, however, Rikhi Kuar gave out that she had actually adopted Samandar Lal, and on the 15th of April, 1900, she executed a deed of adoption in his favour. Similarly on the same date, Asharfi Kuar gave out that she had adopted Jambu Pershad, and she also executed a deed of adoption in his favour, on the 14th of April, 1900. Lala Rup Chand, plaintiff's case was that as a matter of fact neither of the two adoptions had taken place. In para. 10 of the plaint, plaintiff alleged that apart from the fact that no adoption took place, it was "null and void, according to law and custom" for the following reasons. "(1) That two adoptions have been given out by two widows at one and the same time. Both of them are therefore illegal. (2) That Musammat Asharfi Kuar alone had no power to make an adoption in the life-time of Rikhi Kuar. (3) That there was no good faith in giving publicity to the fact of adoption, nor was it the intention of Musammat Asharfi Kuar that some one should actually be adopted, and the adopted son should derive any benefit or he should be owner of the property."

..... (4) That it has been alleged that Jambu Pershad was married, and 23 years old, when he was adopted. This age and time for adoption are not valid, under the Hindu Law and the custom. Moreover, it is improbable that the adoption took place at such an improper time. (5) That Jambu Pershad's father had died. His mother or brother did not give him in adoption, nor had any of them legally a right to give him in adoption." The plaint alleged that Musammat Asharfi Kuar had no right or power under the law to transfer property, under the deed of the 14th of April, 1900. In paragraph 12 of the plaint, plaintiff stated that he was the reversionary heir of Lala Mitter Sein, and that after the death of Asharfi Kuar, he would be the owner of and entitled to the whole estate of Lala Mitter Sein. Upon these allegations, plaintiff instituted the present suit against (1) Asharfi Kuar (2) Jambu Prasad and (3) Malhi Kuar. A joint defence was filed by all the three defendants. Briefly stated, it was to the following effect that the deed of the 14th of April, 1900, was executed with the knowledge and consent of the plaintiff, and the claim to set it aside was barred by the rule of three years' limitation, that Jambu Pershad had as a matter of fact been adopted, and the deed in question executed by Asharfi Kuar, that Asharfi Kuar, being the senior widow, was competent to make an adoption, that she did intend to adopt a boy and that in adopting Jambu Prasad and transferring the estate to him, she was not guilty of any act of bad faith, that the plaintiff was present at the time of the adoption which took place with his knowledge and consent, that Rikhi Kuar did not on that day adopt any other boy, nor had she the power to do so, and that "if any act was done by Rikhi Kuar, it was a mere story fabricated after the adoption of Jambu Pershad, and was based on dishonesty" and was ineffectual as against the defendants, that Sona Kuar, the natural mother of Jambu Pershad, could give him away in adoption, that among Jains adoption had no religious aspect, that it was a purely secular matter, and that under the law and custom, governing the parties, there was no restriction, with regard to the age of the boy to be adopted, nor was there any prohibition against the adoption of a married boy, and lastly, that Jambu Pershad's brother Dip Chand having been adopted by Ugar Sein's widow Musammat Gomti,

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Kuar, his other brothers Atma Ram and Hari Chand had divided the whole of their paternal estate between themselves, and that therefore an estoppel arose in favour of the defendant, the adopted son. The Subordinate Judge fixed seven issues, the first relating to the payment of court-fee not being necessary for the purposes of this report. The other issues were as follows :—(2) Whether Asharfi Kuar, as a matter of fact, adopted Jambu Pershad or not? (3) Was the adoption made with the knowledge and consent of the plaintiff? (4) How does the fact, that before the alleged adoption, Jambu Pershad had been married, and how does his age at the time of adoption affect the claim? Whether according to custom or law, such an adoption could be validly made? (5) How does the relief No. 1 affect the relief No. 2, *i.e.*, is the latter relief superfluous? (6) Whether in the lifetime of Rikhi Kuar, Asharfi Kuar alone could adopt Jambu Pershad? and (7) Whether Jambu Pershad's natural mother could give her son in adoption?

The Subordinate Judge came to the following findings. On the factum of adoption, he found in favour of the defendant. In his opinion, the plaintiff being the person who wanted a declaration that no adoption had taken place, was bound to produce *prima facie* evidence in the first instance to prove his allegation, and that the plaintiff not having produced any evidence, the defendant was entitled to a finding on this point in his favour. The Subordinate Judge relied on *Sardar Singh v. Ram Kunwar*, [1902] A. W. N., 62. He also found that the adoption was not made with the knowledge and consent of the plaintiff, and that even if he had knowledge, he could not be estopped from questioning it. He also held that the claim was not barred by time. He further found that the existence of a custom of adoption of a married boy among Jains by a widow had not been proved by the defendants. It is not necessary to record the finding on the 5th issue, and on the 6th and 7th issues, he came to no findings.

In the result, he passed a decree in favour of the plaintiff.

Defendants appealed.

During the pendency of the appeal, both Malhi Kuar and Asharfi Kuar died, and the appeal was continued only by Jambu Pershad, defendant.

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*Sundar Lal* (with him *Moti Lal Nehru*, *Satish Chandra Banerji*, and *Malcomson*), for the appellant. The Subordinate Judge has found that the defendant was adopted by Asharfi Kuar, but he has held that the adoption is invalid, inasmuch as the defendant was a married man of 23 years at the time of adoption; and that the adoption of such a boy is not supported by the evidence of any custom, obtaining among the Jains. This Court has, however, recently held that a married boy may be adopted among Agarwal Jains.

*Manohar Lal v. Banarsi Das*, [1907] 1 L. R., 29 All. 495, S. C. 4 A. L. J. R., 407.

Most of the witnesses examined in that case have been examined in the present, and this Hon'ble Court believed their testimony in that case. In the present case, over 40 instances of married boys having been adopted have been proved, and out of them a large number were common to both the cases. He then discussed the evidence and referred to

*Bajrangi Singh v. Manokarnika Baksh Singh*, [1907] 5 A.L.J.R., 1 P.C. in which the Privy Council held 18 instances of a custom to be sufficient proof.

*Tej Bahadur Sapru* (with him *E. A. Howard*, *Madan Mohan Malaviya*, and *Lalit Mohan Banerji*), for the respondent submitted that the following questions, arose in the present appeal, (1) whether the fact of adoption had been proved, (2) whether the two widows could make simultaneous adoptions, and, if so, what was the legal effect of such adoptions, (3) whether each of the two widows of Mitter Sein could adopt a boy to herself, or whether a boy could be adopted only with the concurrence of both, (4) whether the natural mother of Jambu Pershad could give him away in adoption, without any such power, derived from her husband, (5) whether the custom, allowing the adoption of a married boy, had been proved.

[STANLEY, C. J.—The question of simultaneous adoptions was not raised in the court below, and it does not appear to

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have been suggested in the plaint either.] He submitted that it was raised in the plaint. In paragraph 10 of the plaint, it was said that 'two adoptions have been given out by two widows at one and the same time. Both of them are illegal.'

[STANLEY, C. J.—The plaintiff's case was that no adoption took place at all]. Yes, and in the alternative, the plaintiff urged that if both the adoptions were found to have taken place on the same date, then neither could be valid as the law did not permit simultaneous adoptions.

[STANLEY, C. J.—Why was no issue fixed on the point]. Plaintiff made an application to that effect and the only order, passed by the Court, was that it should be filed with the record. The Court was bound to frame proper issues and its attention was drawn to the defect.

[STANLEY, C. J.—Presumably your client did not care in the court below to press the application. We shall not allow you to go into the question].

He now took up the first question and that was with regard to the question of burden of proof. In the plaint, plaintiff said that he was a reversioner and this fact was not denied. As the nearest reversioner, he would be entitled to succeed to the estate should he survive Asharfi Kuar. Defendant pleaded his adoption, thereby placing an obstruction in the way of the plaintiff. 'Ordinarily in a case like this, it was for the party who set up adoption to prove it. The plaintiff could not be called upon to prove the negative that is to say, that no adoption took place. He relied on sections 101, 102 and 106 of the Indian Evidence Act. The fact whether the defendant was adopted must be specially within the defendant's knowledge and he must, therefore, prove it.

The leading case on the subject was

*Brojo Kishoree Dassee v. Sreenath Bose*, [1868] 9 W. R., 463.

In this case, plaintiff claimed as heir to Golakh Nath and Muthra Nath, while there were nearer heirs of them alive *viz.*, the sister's sons. Under these circumstances, Sir Barnes Peacock pointed out that the plaintiff who was in the position of a stranger could not be allowed to come into court and

seek for a declaration that an adoption had not been made. Besides the adopted boy had in this case obtained a certificate as against the plaintiff and some others in the Court of the District Judge, and the Sudder Court had in sustaining the judgment of the Judge found for the adoption. The circumstances were peculiar and very much like the case in the Allahabad Weekly Notes for 1902, page 62, relied on by the learned Subordinate Judge. Further, a distinction should be made between the question, whether there was any adoption, and the question whether any adoption admitted or proved, was invalid. The *factum* of adoption should be proved by the party alleging it, and if it was so proved, then the party, impeaching its validity, should be called upon to prove its invalidity. That seemed to be the true effect of the rule in the case in 9 W. R. In

*Tarince Churn Chowdhry v. Shuroda Soonduree Dossee*, [1869] 11 W. R., 468.

the court held that the burden of proving adoption lay on the party who set it up.

[STANLEY, C. J.—But this was a suit for possession and that distinguishes it from yours which is a suit for declaration]. He submitted that so far as the question of *onus probandi* was concerned, the nature of the relief claimed would not, on principle, make any difference. He then referred to

*Gooroo Prosunno Singh v. Nilmadhub Singh*, [1873] 21 W. R., 84. and pointed out that the burden of proof was thrown on the plaintiff, inasmuch as he alleged 'fraud and falsehood' and the adoption had taken place long ago and been acted on. In

*Hur Dyal Nag v. Roy Krishto Bhoomick*, [1875] 24 W. R., 107. the court held that the burden of proof of the adoption lay on the defendant who set it up.

He also referred to and discussed

*Chowdhry Pudum Singh v. Koer Oddey Singh*, [1869] 12 W. R., 1, P. C.

*Rani Chandra Kunwar v. Narpat Singh*, [1906] I. L. R., 29 All. 184, P. C.

He then discussed the case relied on in the lower Court, *viz.* *Sardar Singh v. Ram Kudr*, [1902] A. W. N., 62, and

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submitted that the important circumstance in that case was that the adopted boy had, like the boy in the case in 9 W. R., obtained succession certificate against the widows who sought to obtain declaration against him. He further contended that from the mere fact that the plaintiff did not give any evidence to show that the defendant had not been adopted, it did not follow that the defendant had been adopted, and that the case should be remanded, for evidence being taken on the question of adoption or no adoption. He next took up the third question and submitted that when both the widows among the Jains did not agree to an adoption being made, none could be made, and therefore the adoption of Jambu Parshad was invalid. That this was so, followed from the fact that adoption among the Jains was merely a temporal affair. Among the arthodox Hindus, a senior widow could adopt without the consent of the junior, because by doing so, she was supposed to confer a spiritual benefit upon the husband, and therefore the junior widow was bound to submit to the consequences of an adoption by the senior widow, one of which was the divesting of her estate. No spiritual significance attaching to adoption among the Jains, the senior widow could not by her act deprive the junior of her rights.

[STANLEY, C.J. What is there to show that Rikhi Kuar did not give her consent to the adoption of Jambu]. It was nowhere pleaded in the written statement that Rikhi Kuar was a consenting party, on the contrary, it appeared that the two ladies were not on good terms. The two widows were holding the estate as joint tenants, and one could not by her act destroy the interests of the other or dispose of the property for good. Reference was made to

Maynes Hindu Law, pp. 151, 152, 153.

*Rakhmabai v. Radhabai*, [1868] 5 Bom., H.C.R., 181 at 192.

*Amara v. Mahadgauda*, [1896] I.L.R., 22 Bom., 416.

The case in 22 Bom., laid down, he submitted, the law too broadly. The Judges themselves observed that there was no spiritual significance attached to adoption among the Jains, but still they held that inasmuch as the Jains were ordinarily governed by the Hindu Law, the senior widow among them could

adopt without the consent of the junior. This was he submitted carrying the analogy of the Hindu Law too far.

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He next took up the 4th question and submitted that Sona Kuar could not give Jambu Prasad in adoption. He referred to Ghose's Hindu Law, pp. 596 and 597, and Vasishtha XVII, 26, 28-30, 39 and commented on *Jogesh Chandra Banerjee v. Nrityakali Debi*, [1903] I. L. R., 30 Cal., 965.

On the last question of custom, he discussed the evidence, and with regard to it, he submitted that the oldest instance of a married boy having been adopted did not go further back than 46 years, and that this could not be taken to be equivalent to proving an ancient custom. In many instances better evidence was possible, and might have been produced by the defendant, but was not produced. With regard to the evidence of Jeypore witnesses taken on commission, he submitted that the defendant's pleader had in the lower court admitted that it did not prove the custom set up by the defendant, and had not tendered it, and it could not now be referred to. He relied on

*Kusum Kumari Roy v. Satya Ranjan Das*, [1903] I. L. R., 30 Cal., 999.

As regards proof of custom and character of evidence, he cited

*Gopalayyan v. Raghupatiayyan* [873] 7 Mad., H. C. R., 250 at p. 254.

*Ramalakshmi Ammal v. Sivananantha Perumal Sethurayer* [1872] 17 W. R. at p. 553.

On the history of the Jains, he referred to

*Bhagwan Das Tej Mal v. Raj Mal*, 10 Bom., H. C. R., 241.

Hunter's Indian Empire, pp. 206-209.

*Sundar Lal* in reply. Among the Jains, the rules of adoption were in many material respects different to those that governed the orthodox Hindus, *e.g.* among the Jains, adoption was a purely secular function, a widow could adopt without her husband's permission, a daughter's son and a sister's son might be adopted, and there was no restriction as to age. Among the Jains there were no ceremonies necessary for a valid adoption except giving and taking

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[BURKITT, J. Is the ceremony of giving and taking necessary among them]. Even that was doubtful. It was further the case among the Jains, that a widow had absolute power over her husbands' self-acquired property. In the absence of religious matters and regenerative ceremonies, Hindu Law rules of adoption should not ordinarily be made applicable to Jains. He cited

*Fanindra Deb Raikat v. Rajeswar Das*, [1885] 11 Cal., 463 P. C.

It was clear that in Bombay marriage was no bar to adoption even among Brahmans. He cited.

*Gopal Balkrishna Kenjale v. Vishnu Raghunath Kenjale* [1898] 1. L. R., 23 Bom., 250 at 257.

*West and Birkler's Hindu Law*, 973 and 922. He then discussed some evidence and urged that in other cases custom had been found to be proved upon the evidence of a much smaller number of witnesses. He cited by way of illustration.

*Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri*, [1883] 1. L. R., 7 Mad., 3.

*Chain Sukh Ram v. Mansa Ram*, [1891] 1. L. R., 14 All., 53.

*Stanley, C. J.*

STANLEY, C. J.—The main question raised in this appeal is whether amongst the Jain community, marriage is a bar to adoption. Several other questions have been discussed before us which also must be determined. The suit out of which it has arisen was brought by Lala Rup Chand, claiming to be the heir of Lala Miter Sein, to have a declaration that an alleged adoption of the defendant Jambu Pershad by Musammat Asharfi Kuar, the widow of Lala Miter Sein never took place, and that if it did take place, it was contrary to Hindu Law, and therefore void. The plaint also contains a prayer for a declaration that a document described as a deed of adoption in favour of Jambu Pershad, dated the 14th of April, 1900, executed by Musammat Asharfi Kuar was null and void. No other relief than these declarations was claimed.

Lala Miter Sein died in the year 1890, leaving two widows, namely, Musammat Asharfi Kuar and Musammat Rikhi Kuar and also a daughter, Musammat Raj Kali, him surviving. He was possessed of immoveable property of considerable value, and of moveable property besides. At the time of his alleged adoption, Jambu Pershad was 23 years old, and a married man. Musammat Raj Kali died in the month of June, 1900, and during the pendency of this litigation, both

Musammat Rikhi Kuar and Musammat Asharfi Kuar have died.

As to the *factum* of the adoption, the plaintiff did not produce any evidence whatever in support of his case that there was no adoption, contending that the burden of proving his adoption lay on the defendant. This appears from a proceeding recorded by the Subordinate Judge, on the 2nd of August, 1905. On the 8th of August, as appears from the record, the plaintiff stated that he had come to know of the adoption, on the 14th of April, 1900, and the plaintiff's pleader made a statement to the like effect, and it also appears that the plaintiff made an application to the Court in May, 1905, to have a further issue added, in which the adoption of Jambu Pershad was impliedly admitted, but in which a suggestion was made that Musammat Rikhi Kuar, the co-wife of Musammat Asharfi Kuar, had also made an adoption. The issue so sought to be added was in these terms :—"Whether on the day and at the time of the adoption of Jambu Pershad, any other adoption was made by the second wife of Lala Miter Sein. If so, what was its effect." This application was on the 13th of May, 1905, directed to be filed with the record. Some evidence was as a matter of fact given incidentally by the defendant's witnesses in proof of the adoption. The learned Subordinate Judge held that it lay upon the plaintiff to give some evidence in support of his allegation that there was no adoption in fact of the defendant Jambu Pershad, and the plaintiff having refused to give any such evidence in the absence of such, decided the issue as to adoption in favor of the defendant. But he held upon the main question that the adoption of a married boy amongst the Jains was illegal. The validity of the adoption by a Jain of a married boy was considered by this Bench in the case of *Manohar Lal v. Banarsi Das* (1) in which after lengthy discussion we held upon the evidence that such an adoption was in accordance with a well established practice prevailing amongst the Jain community. In our judgment in that case, we dealt with the origin of the Jain sect and pointed out how, unlike the Hindus proper, the Jains attached no religious significance whatever to adoption, and rejected the restrictions in the way of

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adoption imposed by the Brahmanical priests. We shall treat the historical portion of our judgment in that case, as incorporated in this judgment and thus avoid a repetition of matters which are really not in dispute.

*Dr. Tej Bahadur*, on behalf of the plaintiff-respondent, contended that the *onus* was improperly laid upon his client, of giving evidence in support of his allegation that Jambu Pershad had not been adopted, and that in any case whether his contention in regard to this be right or wrong, an opportunity should now be given to him of making a *prima facie* case, and that an issue, as to the fact of the adoption, should be referred for determination on the merits to the court below.

As regards the legal point it appears to us that it is concluded by authority. The plaintiff as we have said asked the Court to declare that Jambu Pershad never was adopted, and that if he was adopted his adoption was invalid. His suit was brought during the life-time of Musammatt Asharfi Kuar and consequently he could not and did not ask for possession of the property of Miter Sein. It has been held that in a suit brought by the heir of a deceased Hindu for the recovery of his property against a person claiming to be the adopted son of the deceased that upon proof or admission of the heirship of the plaintiff by natural relationship, the *onus*, lies upon the defendant to prove his adoption. *Tarini Churn Chowdhry v. Sharoda Soonduree Dossee* <sup>(2)</sup>, *Chowdhry Pudum Singh v. Koer Oddey Singh* <sup>(3)</sup>, *Gooroo Prosunno Singh v. Nil Madhub Singh* <sup>(4)</sup>, and *Hur Dayal Nag v. Roy Krishto Bhoomick* <sup>(5)</sup>. In the last mentioned case, a distinction is drawn between a suit in which possession is sought, and a suit in which only a declaratory decree is prayed for, and we think that such a distinction ought not to be ignored. In the case of *Brojo Kishoree Dassee v. Sree Nath Bose* <sup>(6)</sup>, in which the plaintiff sued as reversionary heir during the life time of the widow of his deceased ancestor for a declaration that an adoption was invalid, it was held that the *onus* lay on him to prove the invalidity. In delivering the judgment

(2) 11869] 11 W. R., 468.

(3) [1869] 12 W. R., 1. P. C.

(4) [1873] 21 W. R., 84.

(5) [1875] 24 W. R., 107.

(6) [1868] 9 W. R., 463.

of the court, Sir BARNES PEACOCK, C.J., observed. "The plaintiff asked in this regular suit to have it declared that Radha Nath's adoption is invalid; it appears to us that the *onus* rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person, to prove the illegitimacy. The person, who asks the Court to declare that a thing is invalid, is bound to prove that it is so." This ruling was followed by a Bench of this Court in the case of *Sardar Singh v. Ram Kunwar* (<sup>7</sup>). We know of no ruling to the contrary. The principle, upon which the *onus* is fixed, resembles that according to which a plaintiff who sues to set aside deeds, is bound not merely to prove his heirship but must give some evidence to impeach the deeds before he can throw the *onus* of showing a better title on the defendant (see *Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan*) (<sup>8</sup>). In view of the authorities, we must hold that the court below rightly decided the issue, in regard to the fact of adoption, in favour of the defendant Jambu Pershad.

We are unable to accede to the application made on behalf of the plaintiff that the issue as to adoption should be retried, and an opportunity given to the plaintiff of adducing evidence on that issue. The plaintiffs' case was that the adoption did not take place and ought to have been prepared to give some *prima facie* evidence at least in support of it. He would not say that he was in any way taken by surprise. The case was heard at great length. We are told that four weeks were occupied in the examination of witnesses. Some evidence was given by the defendant in proof of the *factum* of his adoption, and as we have already said the plaintiff admitted that he had knowledge of it. One of the witnesses for the defendant, Dhumi Chand deposed to the adoption and stated that he himself attended the adoption ceremony. Sham Lal, another witness, also deposed that he was present at the adoption ceremony. The fact of the adoption indeed was not seriously disputed. When the Court held that the *onus* lay upon the plaintiff to give evidence, it was open to him to produce his witnesses but he refused to do so, and it would be unreasonable, we think now to reagitate the question. It is undesirable to send back the case to be retried on this issue.

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7) [1902] A. W. N., p. 62.

(8) [1874] L. R. L., L. A., 192 at p. 206.

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The next point, raised on behalf of the plaintiff, was that Musammat Asharfi Kuar could not adopt a son, without the consent of her co-widow Musammat Rikhi Kuar. One answer to this is that there is no evidence that Rikhi Kuar did not give her consent to the adoption. But there is a further answer, namely that according to Hindu Law, a senior widow can adopt a boy without the consent of her co-widow. This is not disputed but with strange inconsistency it is said that Hindu Law does not in all matters apply to the Jains and that inasmuch as both the widows inherited jointly the property of their husband it would be inequitable to permit one widow to deprive her co-widow of her interest without her consent. But it has been held that the ordinary Hindu Law of inheritance is applicable to Jains in the absence of proof of special customs and usages varying that law (*Chotay Lall v. Chunno Lall* (9) and the same rule has been applied to matters of adoption although the reasoning on which the law is based is not wholly applicable to the Jains as no spiritual efficacy attaches in their case to adoption (see *Amara versus Mahadgauda* (10). In that case it was held that where the son of the owner of an estate died childless in his father's life-time, leaving two widows, and after the father's death without leaving a widow or descendants the two widows of his son inherited his estate as his nearest *sapindas*, an adoption by the senior widow was valid, though the younger widow did not consent to it, and although the adoption divested the estate which she had inherited from her father-in-law. This case is instructive but it must not be overlooked that the Maiyukha School of law, and not the Mitakshara, prevails in Bombay. No attempt however has been made to prove any custom amongst the Jains at variance with the ordinary Hindu Law upon this point : and this being so, we must reject the argument which has been addressed to us by *Dr. Tej Bahadur*.

The next point raised by him was that Sona Kuar, the natural mother of Jambu Pershad could not give her son in adoption, without the authority of her deceased husband. If the husband had been alive it is not disputed that his wife could not have given his son in adoption but the husband being dead there appears to be no objection to the giving in

(9) [1878] L. R., 6 L. A., 15. (10) [1896] L. L. R., 22 Bom., 416.

adoption of his son by his widow. In the connected appeals of *Sri Balusu Gurulingaswami v. Siri Balusu Rama Lakshamma* (11), and *Radha Mohun v. Hardai Bibi* (12), it was held by their Lordships of the Privy Council on a question of adoption peculiar to the appeal from Madras, that the authority of a widow in reference to adoption, not being identical in different schools of Hindu Law, it is established in Madras, in regard to the giving of a boy in adoption by the widowed mother, that unless there has been some express prohibition by the husband, the wife's power, with the concurrence of *Sapindas*, where that is required, is co-extensive with the power of the husband and that the adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the *Sapindas* in the absence of express power from her husband. The appeal from the Allahabad High Court was from a decision of a Full Bench, holding that according to the Benares school of Hindu Law the giving in adoption of an only son is sinful and to that extent contrary to the Hindu Law but that the adoption of such a son having taken place in fact was not null and void. Dealing with this appeal, their Lordships rejected the fundamental position taken up by MITTER, J, in *Raja Upendra Lal Roy v. Srimati Ram Prasanna Mayi* (13), namely that "the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly if not wholly from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable." They held that the doctrine thus propounded by MITTER, J, was "equally opposed to reasonable construction of the books, apart from religion, and to decided cases," and after an elaborate treatment of the law upheld the decision of this Court. We decide this question against the respondent.

Of the minor questions raised on behalf of the respondent, the last is that the Court ought to have determined the issue sought to be raised by the plaintiffs in their application of May, 1905, namely whether on the day and at the time of

(11) [1899] I. L. R., 22 Mad., 398. (12) [1899] I. L. R., 21 All., 460.

(13) [1868] 1 B. L. R., 221.

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the adoption of Jambu Parshad any other adoption was made by the second wife of Miter Sein, and if so what is its effect. The answer to this is that it was not the case of the plaintiff that Rikhi Kuar adopted any boy. On the contrary in his plaint he denied that any adoption by Rikhi Kuar ever took place. In their written statement the defendants also denied that Rikhi Kuar had made any adoption. The parties therefore were agreed as to this and consequently there was no necessity to add the issue which the plaintiff sought to raise.

This brings us to the main question in the appeal, namely whether or not amongst the Jains, marriage is a bar to adoption. As we pointed out in the case of *Manohar Lal v. Banarsi Das* (14) the members of the Jain community are mostly engaged as traders and shop-keepers, and therefore we cannot expect to find records of adoptions such as are met with in the case of land owners; proof by instances is the class of proof which ordinarily could be adduced to establish the practice of the community in regard to adoption.

We also pointed out that admittedly Jains can adopt a boy at any age, provided that he be not married, the ceremonies of tonsure and investiture with the sacred thread not being observed by them. We further pointed out that the contention advanced against the alleged practice is not that the custom amongst the Jains in regard to adoption is similar to that recognised by the Hindus of the twice born classes but is similar to that which is binding amongst the *sudras*. In that case we held that 23 cases of adoption of married boys were proved, namely 9 in Muzaffarnagar, 7 in Saharanpur, 3 in Dehli and 4 in Meerut and in view of the fact that the Jain population was not large and was scattered about, we held that the number of cases proved was sufficient evidence of the legality of these adoptions. In addition to the former illustrations of the practice so proved the defendant Jambu Prasad in this case adduced evidence in proof of the adoption of a number of other married boys, including Udai Ram, Kabul Singh, and Parqash Chand in the Saharanpur district; Tilok Chand in the Muzaffarnagar district; Anup Singh, Murari Lal, Piarey Lal, Chanchal Rai, Kanhaia Lal and Sukan

(4) [1907] I. L. R. 29 All., 495.

Chand in the Meerut district, Summan Lal and Juggi Mal in the Delhi district and Makhan Lal in the Karnal district, as also six other instances which have not been pressed. In addition to this evidence was given on commission to prove the adoption of married boys in the Jaipur State which borders on the Agra district. In the present case 19 of the instances which were proved to our satisfaction in the former case, were also relied on, in addition to those mentioned above. As the parties to this litigation are different from the parties to the former case, we have been obliged to consider the evidence adduced in support of each alleged case of adoption including the instances proved in the former appeal, and also the rebutting evidence, and the criticisms of the court below upon that evidence. As to six of the instances which were not pressed, the evidence is not satisfactory and we put them out of consideration. These are the cases of Behari Lal, Kanhaia Lal, Khub Chand, Radha Mal, Ishq Lal and Khushdil Prasad.

We shall first deal with the Saharanpur cases. The first case is that of Sikri Prasad, who is said to have been adopted by Mitthan Lal. One Ganga Ram, a Saraugi Agarwala Jain, deposed that amongst the Jains, married as well as unmarried boys were taken in adoption; that Sikri Prasad was taken in adoption by Mitthan Lal from his natural father, Murli Dhar and that at the time of his adoption, he was married; and that he (the witness) attended the adoption ceremony. He stated that Sikri Prasad was twice married, his first marriage being with a member of the family of Lala Dhum Singh, and his second marriage with a daughter of Nihal Chand. He stated that he did not know if any boy, other than Sikri Parshad, Jambu Parshad and Dip Chand, were taken in adoption after marriage.

Another witness, Shankar Lal, of the same caste, a shop-keeper at Saharanpur, stated that he was a *chaudhri* of the Agarwala Jains and had been such for 10 or 15 years; that amongst the Jains, a married boy can be taken in adoption; and that there was no restriction as to age. Then he stated that Sikri Prasad was taken in adoption by Mitthan Lal. In cross-examination, he stated that Sikri Prasad was 13 or 14 years of age at the time of his adoption; that a man brought a message to his brother that Sikri Prasad was about to be

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adopted that day and that he should attend the ceremony and that he (the witness) and his brother Buland Roy went to the ceremony and so he had knowledge of the adoption. He was unable to say whether Mitthan Lal's wife was alive at the time of the adoption, which took place 18 or 19 years ago. The witness further stated that he attended the first marriage of Sikri Prasad which took place about 22 years ago. Another witness, Lachman Das, also a shop-keeper, deposed that according to custom amongst the Jains, a married as well as an unmarried boy may be taken in adoption, and he gave as illustrations the cases of Kabul Chand, Sikri Prasad, Jambu Prasad, Dip Chand and Udai Mal. Sikri Prasad, he said was twice married, his second wife being the witness's own niece (daughter of his brother). Udai Mal, he said, was 18 at the time of his adoption and at the time of his marriage to the witness's niece was 26 or 28 years of age. He mentioned the name of the natural father of Udai Mal, namely, Ramanand.

Another witness Dhumi Chand deposed to the adoption of Sikri Pershad. He is a zamindar paying Rs. 700 or Rs. 725, as Government revenue. He stated that among the Jains, married as well as unmarried boys were taken in adoption and that he had knowledge of this custom from the fact that Sikri Prasad, Lala Jambu Das (that is Jambu Prasad) Dip Chand and one Parqash Chand had been taken in adoption (that is after marriage).

The rebutting evidence in this case is that of Govind Rai, a *kanungo*, residing at Kalpahar in Saharanpur. He admitted that Sikri Prasad "was kept by his paternal uncle (*i.e.*, Mitthan Lal) but said that the ceremony of adoption was not performed." In cross-examination this witness stated that Sikri Prasad was first married to Lala Dhum Singh's daughter 25 or 26 years ago and that he attended the marriage ceremony and that he was married a second time in the family of Baherawallas about 8 or 10 years ago. He also said that Mitthan Lal kept Sikri Prasad from the age of 6 years.

Morah Mal makes the bold statement that Sikri Mal was not adopted by any one, and Ram Prasad makes a similar statement. The last witness admitted in cross-examination that Sikri Prasad was married twice the first marriage having

taken place 20 or 25 years ago, and the second marriage 11 or 12 years ago, and that both the marriages were celebrated by Murli Dhar, his natural father. He admitted that Sikri Prasad for the past 7 or 8 years had been living with Mitthan Lal and assigned the reason for this that there was some dispute in Murli Dhar's house.

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On this evidence, we have no hesitation in coming to the conclusion that Sikri Prasad was adopted by his uncle Mitthan Lal, when he was a married boy. The learned Subordinate Judge rejects the evidence given in support of the adoption, pointing out discrepancies in the dates assigned by the witnesses to the adoption, and the marriage of Sikri Prasad. He says that "all the witnesses examined to prove this instance are men of no position," and held that the adoption was not proved despite the fact that no evidence of any value was given to rebut the evidence add in support of it.

We do not agree with the learned Subordinate Judge that the witnesses, who deposed to the adoption, are men of no position. One is a cloth merchant and two others are shopkeepers, one of these Shunker Lal being a chief man in his district, and the other being connected with Sikri Prasad, through the marriage of his niece. The other witness is a well-to-do zamindar. We attach no importance to the discrepancy, pointed out in the matter of dates. It is not to be expected that witnesses will remember with accuracy such matters. The criticism of the evidence by the learned Subordinate Judge in this case not unfairly represents the way in which he dealt throughout in his judgment with the evidence given in support of instances of the adoption of married boys. We do not propose to deal *seratim* with the evidence given in support of the instances, which were established to our satisfaction in the case of *Manohar Lal v. Banarsi Das*, but we shall refer to a few only of these instances.

Ajit Prasad, who was the natural son of one Sagun Chand deposed to his adoption by Gurdial Singh 5 years ago. He stated that he was married 15 years ago and that at the date of his adoption he was 25 years of age. At the time of his adoption, he said, the members of the brotherhood assembled and *laddus* were distributed and his mother taking hold of his hand put it into the hand of Gurdial Singh.

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A witness Bhagwan Das, a resident of Sarsawa, a zemindar and thekadar, deposed that among the Jains married as well as unmarried boys were taken in adoption, and that in his presence 5 or 6 married boys were adopted, namely, Ajit *i.e.*, Ajit Prasad and Janki at Sarsawa, Parkash Chand at Nakur, Udia Ram, Jambu Prasad and Dip Chand at Saharanpur. Ajit Prasad's natural father, he said died 7 or 8 years before his adoption by his uncle Gurdial Singh, and after his death Ajit lived with his mother at Bhuria.

Another Bhagwan Das a resident of Sirsawa and son of Bahadur Singh also deposed to the alleged custom and stated that at Sirsawa married boys namely Janki Das and Ajit Prasad had been taken in adoption. Sirsawa is in the district of Saharanpur.

The evidence of these witnesses was not contradicted and we see no reason why credit should not be given to it.

The adoption of Janki Das a married man by Chhaju Mal's widow is proved by the unrebutted evidence of the two persons of the name of Bhagwan Das to whom we have already referred, both deposing that they were present at the adoption. The learned subordinate Judge rejected the evidence of these witnesses as untruthful, but we see no reason for distrusting it. An adoption is a matter of such notoriety amongst caste fellows and others living in the neighbourhood of the parties that it is highly improbable that witnesses would come forward and depose to an adoption which had never taken place.

Another instance is that of Banwari Lal, the natural son of Lala Nagar Mal, who is said to have been adopted by Lala Bansi Lal the brother of Nagar Mal. This adoption is proved by Jai Dayal Mal and Yad Ram. Jai Dayal Mal is a zamindar and money lender, of the age of 70 years, paying Rs. 2500-a year revenue and Rs. 35 income-tax. He deposed that he built a Jain temple at Muzaffarnagar and that among the Agarwala Jains a married as well as an unmarried boy is taken in adoption and that he was aware of this from the fact that such adoptions had taken place in his time, and that of others before his time, he had heard from his elders. He then mentioned two instances which had taken place within his memory at Muzaffarnagar, one being that of Banwari Lal and the other of Tilok Chand Banwari Lal was adopted he

said by Bansī Lal who was the son of the witness' paternal uncle Bahadur Singh. Then he stated that Banwari Lal was married thrice, his first marriage having taken place about 50 years ago, the second about 34 years ago and the third about 17 years ago. Bansī Lal carried on a money-lending business and had property besides, and upon his death Banwari Lal, he said, took possession of it while the estate of Nagar Mal was taken possession of by his other son Dasaundhi Ram. Then he referred to the adoption of Tilok Chand by Khairati Ram whose daughter had been married to Tilok Chand before the adoption, and said that he (the witness) was present when the members of the brotherhood assembled on the occasion of the adoption of Banwari Lal, and that he also joined the marriage procession, and was present at the marriage of Banwari Lal. This witness is a man of position and one to whose evidence weight should be attached. He is corroborated by Yad Ram who deposed to the adoptions of three married men, namely, Ishq Lal, Banwari Lal and Tilok Chand, and stated that Banwari Lal was adopted at the age of 22 or 24 by Bansī Lal, that Tilok Chand was adopted by Khairati Ram at the age of 26 or 27 years, and that he knew both the adoptive fathers, being on social terms with them and visiting them on occasions of marriages. He came to know of the adoptions of Banwari Lal and Tilok Chand from Banwari Lal as well as from the members of his family, and he attended the first marriage of Tilok Chand. In cross-examination he stated that he attended the second marriage of Banwari Lal to a member of a family, residing at Silawah and that that marriage was celebrated by Bansī Lal, and that Nagar Mal and all his brothers joined the marriage procession at the time of his second marriage.

The only rebutting evidence given in this case is that of Khairati Ram. He is a brother of the plaintiff's general attorney. In his direct examination he stated that Banwari Lal's first marriage took place 35 or 36 years ago, and that he attended that marriage, but upon cross-examination he was unable to state in whose family Banwari Lal was married.

The learned Subordinate Judge disbelieved the evidence of Jai Dayal Mal stating that he was a tutored witness, and he

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did not believe the evidence of Yad Ram. He observed that a mere perusal of the evidence will show that Jai Dayal Mal is a tutored witness. We cannot agree with the learned Subordinate Judge as to this. We can discover no sign of tutoring in his evidence. He appears to be a highly respectable member of the Jain community and a man of substance, and we see no reason why his evidence given with so much detail should be rejected.

We now pass on to the case of Juggi Mal, who is said to have been adopted by Mehr Chand. Mehr Chand is a contractor and banker and a man of position, being a *Darbari* of the Governor-General since the year 1877. He is an Agarwala Jain, as are all the witnesses who deposed to instances of adoption which have been established in evidence. He deposed that he built a Jain temple in Delhi and in 1879 had the *Pratishta* ceremony performed at the cost of 4 or 5 lakhs of rupees. He then stated that he adopted a son, namely, Juggi Mal, on first *Magh Sudi* Sambat 1951, corresponding to 1904. Juggi Mal was in 1905, 39 or 40 years of age, and his first marriage took place 23 or 24 years ago, and his second marriage was celebrated by the witness at a cost of Rs. 2,500. In cross-examination, he stated that all the members of the *Panchayet* took part in Juggi Mal's marriage, but said that his cousin Chunni Lal wished to give his own son in adoption to the witness, but that he (the witness) did not wish to take him in adoption owing to his tender age and in consequence of this Chunni Lal dissociated himself from the *Panchayet*. He further stated that he consulted two or four men of his brotherhood before making the adoption and that they approved of it.

Sangam Lal also gave evidence as to this adoption, but there can be no controversy in the matter, as it is one of public notoriety.

A witness for the plaintiff, Jauhari Mal, admitted that the adoption took place, but stated that the persons assembled regarded the act of taking a grown-up and married boy with disfavour. This witness, who appears to be a respectable man, being a banker and treasurer of the National Bank of Upper India at Delhi, in answer to a question in cross-examination, stated that the members of the brotherhood

objected to the adoption of Juggi Mal, because he was of advanced age and the wife of Mehr Chand was younger than he, and then he made this important admission that "there was no other objection." In the course of his evidence, he also stated that he had heard that one Anup Singh was taken in adoption at Kotana, and a married boy was taken in adoption in the family of Gulab Singh, Naha Singh at Meerut. It is remarkable that of the many cases of adoption of married boys, of which evidence has been given, in no single case has any proof been given that any caste penalty followed.

Piarey Lal, a witness for the plaintiff, stated that amongst the Agarwala Jains, a married boy is not taken in adoption, but he admitted that Juggi Mal, a married boy, was taken in adoption by Mehr Chand. This witness is a pleader practising in Delhi. He admitted that he attended the *sagai* ceremony of Juggi Mal, so that he was not seriously offended by the fact of Juggi Mal's adoption.

Ishri Pershad, an Honorary Magistrate and also Government Treasurer at Delhi, deposed that so far as he remembered, no married boy, except the boy adopted by Mehr Chand, was taken in adoption in Delhi. He stated his opinion that the adoption of a married boy, or a grown-up boy, was not proper, and that he did not approve of it. He stated that the *panchayet* of Delhi had not made any rule to the effect that a married boy should not be taken in adoption. It was proposed, he said, that a *panchayet* should be held in connection with the adoption made by Mehr Chand, but that such had not been held as there was no leisure and the matter was not considered to be of great importance. It is clear from this evidence that the members of the brotherhood in Delhi did not regard the adoption of a married boy obnoxious to any rule governing the Agarwala Jains, though they personally did not approve of the practice.

The learned Subordinate Judge treated this case as proved, but considered it a breach of the rules of caste or of law and cited from a report this passage :—"Occasional breaches of general rules of caste or law do occur but a few modern breaches of such a rule do not constitute an ancient and invariable custom." He treated this adoption as simply a case of the breach of the law or of usage.

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We shall pass over the other instances which were established to our satisfaction in the case of *Mandhar Lal v. Banarsi Das* with this observation that we have carefully considered the evidence which has been laid before us and the criticisms passed upon it, and we see no reason for coming to a different conclusion from that at which we arrived on the evidence furnished in that case.

Evidence in proof of 13 additional instances has been laid before us in this appeal not including evidence of adoptions of married boys in the Jaipur State, namely, two in the Saharanpur district, one in the Muzaffarnagar district, 6 in the Meerut district, 2 in the Delhi district and one in the Karnal district. The first is that of Udai Ram, said to have been adopted by Banwari Lal. Lachman Das, to portion of whose evidence we have already referred, said that he was aware of the adoption of married boys and gave as an instance the case of Udai Mal and others. Udai Mal (also called Udai Ram) he stated was taken in adoption by Banwari Lal at the age of 18 and lives near the witness' house in mohalla Yadgar in Saharanpur. The name of his natural father was Ramanand, who was brother of Banwari Lal. Ramanand, he stated, left 3 sons, the eldest being Ajudhia Pershad, the second Chhamman Lal and the third Udai Mal. Udai Mal was taken in adoption, he stated perhaps 12 or 13 years ago, and was married 20 years ago after the death of Ramanand.

Bhagwan Das, to whose evidence we have also referred, deposed that married as well as unmarried boys were taken in adoption and mentioned the adoption of two such boys at Sirsawa and then stated that two other married boys had also been taken in adoption, namely, Udai Ram who was taken in adoption by Banwari Lal, and the other Parqash Chand, who was taken in adoption by Kishori Lal. In cross-examination, he gave the name of Ramanand as the natural father of Udai Ram and stated that Udai Ram was taken in adoption 18 or 20 years ago.

Then we have the evidence of the other Bhagwan Das, the son of Govind Rai, who mentioned the name of Udai Ram as one of a number of married boys who were taken in adoption

at Saharanpur. Udai Ram, he said, was taken in adoption by Banwari Lal some 14 or 15 years ago. His partner, he said, was related to Banwari Lal. The only rebutting evidence is that of Morah Mal and Ram Pershad. The former deposed that "no one adopted Udai Mal in my presence." In cross-examination, he said that he never attended any adoption ceremony at Saharanpur, or outside of Saharanpur, and that Udai Mal was not a friend of his nor was he on visiting terms with him. Further pressed as to how he knew that Udai Mal had not been adopted by any one, he stated that he had heard that such was the case. He knew nothing of Udai Mal's age or of his marriage and it is quite evident that he knows nothing whatever about him. His evidence is worthless. Ram Pershad's evidence is equally valueless. He deposed that Udai Mal was not adopted by any one. On cross-examination as to how he knew this his answer was :—"Invitations are sent out when a ceremony takes place in the brotherhood. Hence I say that Udai Ram was not adopted." He admitted that he had no relationship with Ramanand, the father of Udai Ram, or with Banwari Lal. It is therefore unlikely that he would have received an invitation to the adoption ceremony. Although the evidence in support of this adoption is not strong, we see no reason for distrusting it. Bhagwan Das the son of Govind Rai, was actually present at the adoption, if his evidence be true. He is a man in a fairly good position of life and we do not think that we ought to reject his testimony.

The next instance is that of Kabul Singh (also called Kabul Chand), said to have been adopted by the widow of one Raghu Mal. Shanker Lal, a Choudhri of the Agarwala Jains in Saharanpur, who has already been mentioned, deposed to this adoption. He stated that he heard that Kabul Singh had been taken in adoption by Raghu Mal 20 or 21 years ago and he was aware that Kabul Singh was during his life in possession of the property of Raghu Mal and that his sons are now in possession of it. The importance of this evidence is that Kabul Singh, who was the natural son of Nanhu Mal, acquired the property of Raghu Mal on his death and remained in possession of it up to the time of his own death. If he had not been adopted by Raghu Mal he would not have got his property. Lachman Das, who was related to Kabul Singh,

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the latter being a grandson of his aunt, deposed that Kabul Singh was adopted by the wife of the paternal uncle of Nanhu Mal, namely, Raghu Mal and that his marriage was performed by Nanhu Mal and that at the time of his adoption, he was 28 or 30 years of age. The adoption, he said, took place about 20 or 21 years ago, and Kabul Singh had been married 27 or 28 years ago. This witness from his relationship would be certain to know of the adoption, if it took place; and in view of the fact that the evidence in support of the adoption stands un rebutted, we see no reason why we should not accept it. The only point which the plaintiff made against the adoption was that in the will of Raghu Mal, Kabul Chand is described as the son of Nanak Chand, his natural father, but there is nothing in this point, seeing that the will was executed before the date of the alleged adoption, namely, on the 27th of November, 1883. Now we do not expect in a case where instances of adoptions are being proved that all possible evidence as to each adoption should be exhausted. If such were required, it would be beyond the means of litigants to establish their suits, so costly would be the prosecution of them. The evidence must be such however as would ordinarily satisfy an unprejudicated mind beyond reasonable doubt that the adoptions alleged did take place.

Another instance is that of Parqash Chand, who is said to have been taken in adoption after marriage by the wife of Kishori Lal at Nakur. The two witnesses named Bhagwan Das deposed to this adoption, but neither of them appears to have attended the adoption ceremony. One of them says that he heard of the adoption at the Tahsil Office at Nakur, and also at the house of Daya Chand three or four years before his examination; that there were some people congregated at the place who were speaking on the subject, and in answer to a question put by him, stated that the wife of Kishori Lal had taken Parqash Chand in adoption, and they said that he had already been married. The evidence of the other Bhagwan Das is also hearsay and of little value. Dhumi Chand, a zamindar residing at Saharanpur, deposed that Parqash Chand was taken in adoption about six years ago by the wife of Kishori Lal. Sangam Lal, a commission agent, resident of Ambetha, mentioned a number of adoptions of

married boys, and amongst others that of Parqash Chand with whom he was acquainted. The evidence, in support of this adoption, is weak but the fact of the adoption is not denied. The only matter which is denied is that Parqash Chand had been married before his adoption. Gobind Rai, a witness for the plaintiff, deposed that he knew Parqash Chand, and that he was adopted by Kishori Lal (but that he was married after Kishori Lal's death) and that his marriage was celebrated by Kishori Lal's widow. The adoption, he said, took place more than 7 years and 4 or 5 months ago. We think the weight of evidence establishes that Parqash Chand was adopted by the widow of Kishori Lal and not by Kishori Lal himself, and that his marriage took place before his adoption.

The next instance is that of Tilok Chand, who is said to have been adopted after marriage by Khairati Ram. Khairati Ram himself deposed to this adoption. He is a zamindar and money-lender, residing at Muzaffarnagar, and pays Rs. 700 or 800 annually as Government revenue, and is the manager of a panchaeti temple and President of the Panchayet at Hastinapur. He deposed that his daughter was married to Tilok Chand 14 years ago, and that he has since adopted him and celebrated his second marriage. The adoption took place, he said, two years ago, 3 or 4 months after the death of the witness' daughter. In cross-examination, the witness stated that a deed of adoption was executed, and was attested by Ram Sukh Das. Two witnesses, Jai Dayal Mal and Yad-Ram corroborated the evidence of this witness. To portion of Jai Dayal Mal's evidence we have already referred. As regards the adoption of Tilok Chand, he stated that Tilok Chand was adopted by Khairati Ram and that before the adoption, he had been married to Khairati Ram's daughter. The adoption took place, he said, a little less than 2 years ago. This witness was not present at the adoption, but merely heard of it from Khairati Ram, so that his evidence is not of much value. Yad-Ram, who was acquainted with Khairati Ram and Tilok Chand, and is on social terms with them, deposed that Tilok Chand was adopted by Khairati Ram at the age of 27 or 28 years, but he admitted that he only knew of this adoption from conversation with Panwari Lal as also with members of his

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family, but he attended the first marriage of Tilok Chand. He also had conversation with Tilok Chand about his adoption. The only rebutting evidence is that of Mitter Sein, who denied that Khairati Ram took any boy in adoption, but in cross-examination, admitted that he had heard that Khairati Ram kept his son-in-law, though he did not perform any ceremony. The learned Subordinate Judge in dealing with the evidence of Jai Dayal Mal said that "he had not the courage to say that the adoption was made in his presence," that is, he had not the courage to tell a falsehood. The adoption did not take place in his presence, and therefore he did not assert that it did. He had, we might say, the courage to be truthful. The learned Subordinate Judge did not consider that this instance was satisfactorily proved and assigns a number of reasons for the conclusion, at which he arrived, but we are wholly unable to agree with him. We think that the evidence of Khairati Ram is truthful and it of itself is quite sufficient to prove the instance.

We now come to Anup Singh, who is said to have been adopted by the widow of one Murari Lal 9 years ago. Anup Singh who is a Zamindar and money-lender himself gave evidence and deposed that he was adopted by Musammat Chameli, the widow of Murari Lal, who was his own brother, 8 months after the death of Murari Lal. He said that he was first married at the age of 12 years and that his second marriage took place "after his adoption about 9 years ago when he was 25 years old." He gave as a reason for his second marriage that he had no issue by his first wife, who was still living, as was also his natural father, Banarsi Das, who lived at Sampat in the district of Delhi. His father he said gave him in adoption. Then he said he was in possession of the zamindari property of Murari Lal as also of money in deposit and Government promissory notes of the value of about 3 lakhs of rupees, that he had an income of Rs. 8,000 a year from the property, and that he paid Rs. 150 per annum income-tax on account of the estate of Murari Lal. After his adoption, he said, Sultan Singh and Umrao Singh brought a suit against him disputing, we presume, his adoption and this suit was compromised, he getting the entire property of Murari Lal but giving Rs. 29,000 to

Umrao Singh. This litigation arose in this way. Sheo Singh Rai, Ishq and Dalpat Rai, were three brothers. Sheo Singh adopted Nihal Singh, Sultan Singh and Multan Singh were Nihal Singh's sons. Ishq Lal adopted Murari Lal the husband of Musammat Chameli and Musammat Chameli adopted Anup Singh. Umrao Singh was the adopted son of Dalpat Rai.

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If the adoption of Anup Singh was not valid, Umrao Singh as the heir of Murari Lal was entitled to his estate. The learned Subordinate Judge rejected the proof of adoption in this case on the ground that Anup Singh compromised the suit with Umrao Singh and gave him Rs. 29,000. But there does not appear to us to be much force in this criticism. In view of the fact that the estate in dispute was of the value of 3 lakhs, we think that Anup Singh possibly acted prudently in avoiding protracted litigation, by the payment, which he made to Umrao Singh of a sum equivalent to less than one-tenth of the value of the estate at stake, particularly too as Umrao Singh was according to the Subordinate Judge a man of no position. The important fact is that the validity of the adoption was accepted and that Anup Singh by virtue of it acquired the property of Murari Lal. Anup Singh further deposed that when he was adopted the members of the brotherhood assembled and *laddus* were distributed. His evidence is corroborated by that of Jugul Kishore and Shiam Lal.

Jugul Kishore stated that Anup Singh was taken in adoption by the wife of his brother Murari Lal when he was about 28 or 30 years old, and that this adoption took place in his presence and was publicly known. Shiam Lal deposed that he also was present at the adoption which took place in the village of Katana. No evidence was given to contradict these witnesses. The plaintiff's witnesses Jauhari Mal indeed supported them. He stated that he heard of the adoption of Anup Singh at Katana. In cross examination, this witness said that he had never been present at the adoption of a married boy, but in answer to the question:—"is there any harm, if the boy taken in adoption belongs to the brotherhood and is younger than the adoptive father and the adoptive mother" he replied:—"I did not see a married boy taken in

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adoption. Otherwise there is no harm in taking a young boy in adoption." This witness, as we have already pointed out, is a man in good position, being a banker and a treasurer of the National Bank of Upper India at Delhi. The evidence satisfies us beyond any doubt that Anup Singh was adopted after marriage.

The next instance is that of Murari Lal, who is said to have been adopted by the widow of one Nand Ram. His adoption is proved by Jugul Kishore. He deposed that amongst the Jain Agarwalas a married boy is taken in adoption, and as illustrations he referred the adoptions of Anup Singh, Murari Lal and Mithan Lal, all of whom were married before their adoptions. Murari Lal was taken in adoption, he said, at Baraut where he (Jugul Kishore) resides and the adoption took place in his presence. Questioned as to how he came to know that Murari Lal was married, his answer was that when he was adopted, his wife accompanied him. The only rebutting evidence in this case is that of Bhagwant Rai, who made the bald statement that Nand Lal's widow did not adopt any one. In cross examination, he admitted that he had no friendship with Murari Lal, who was 23 or 24 years old and he was unable to state how many times he was married. He also said that he must have been married, but he was not aware of the marriage and that Nand Lal's wife did not appear before him. It is clear that this witness has no knowledge whatever of the family. We see no reason for rejecting the evidence of Jugul Kishore, as did the learned Subordinate Judge on the ground that neither the natural father or adoptive mother of Murari Lal was examined and that the evidence of Jugul Kishore was not reliable. Jugul Kishore is a man of substance, holding zamindari property and being also engaged in money dealings. He pays Rs. 136 odd income-tax and gets over a thousand rupees in annual profits from his zamindari. We see no reason for distrusting his evidence.

The adoption of Behari Lal by the widow of one Jawahir Lal, that of Kanhaiya Lal by Salig Ram's widow, and of Sujan Chand by Amin Chand are proved by the uncontradicted evidence of Shiam Lal, a resident of Meerut. He deposed that married as well as unmarried boys were adopted, and that the custom had been in vogue since the time of his

ancestors, and that he had heard of it from them. He himself attended at the adoptions of 8 or 10 married boys and amongst others the adoption of Behari Lal by the widow of Jawahir Lal, the adoptive mother, who belonged to the witness's family, she being his paternal grand-mother. He stated:—"in my family at Binauli my paternal grand-mother, who was the wife of Jawahir Lal, adopted Behari Lal," and then he proceeded to say that in addition to this adoption the wife of Mohan Lal adopted Chanchal Rai in Mouza Halowari and in the same mouza, the wife of Salig Ram adopted Kanhaiya Lal. Then he refers to several other similar adoptions and amongst others to that of Sujan Chand in Baghpat by Amin Chand Seth. Sujan Chand's adoption, he said, took place a little more than 40 years ago. In cross-examination, this witness stated that Sujan Chand was the nephew of Amin Chand. He also said that he (the witness) attended the marriage of, amongst others, Behari Lal, who was adopted after his marriage. Now adoptions are matters more or less of public notoriety, and we find it hard to believe that evidence such as that given by Shiam Lal was fabricated for the purposes of this case. He was cross-examined at very great length but was in no respect shaken. The learned Subordinate Judge rejected the proof in these cases, as the evidence of Shiam Lal was not corroborated. As regards Behari Lal, he pointed out that he got possession of his alleged adoptive mother's property after her death and remarked that as she inherited this property from her husband, Bihari Lal, if he was adopted by her, ought to have at once got possession of it. As to this we may remark that according to our experience out of respect, if for no other reason, a son, whether he be an adopted son or a natural son, frequently permits the property of the deceased husband, his father, to be recorded in the name of and enjoyed by his widow for her life. We attach no importance therefore to the fact that Jawahir Lal's widow remained recorded as the owner, but we do attach importance to the fact that Behari Lal is now in possession of the property, to which he could have no claim unless as an adopted son.

We now come to the case of Samman Lal who is said to have been adopted after marriage by Sukhanand. This instance is proved by Samman Lal himself. He is a shop-

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keeper at Delhi. He deposed that he was adopted by Sukhanand about 25 or 26 years ago after his marriage, which took place 30 years ago. His real father, Patar Chand, he said, celebrated his marriage. In cross-examination, he stated that Patar Chand and Sukhanand were brothers, that Patar Chand died 2 years ago, while Sukhanand died 13 years ago. His natural mother was, he said, still living. Sukhanand and Patar Chand were separate in business and their property was separate. The evidence of this witness is uncontradicted and we see no reason for distrusting it.

The next instance is that of Makhan Lal, who is said to have been adopted by Mangal Sen. The only evidence in support of this adoption is that of Makhan Lal himself, but his evidence is also uncontradicted. Makhan Lal is a road contractor. He is upwards of 50 years of age. He stated that his natural father's name was Chhatar Mal and that he is the adopted son of Mangal Sen. He was adopted, he said, 30 years ago when a married man, his marriage having taken place 40 years ago. In cross-examination, he stated that his first son was born before his adoption and his second son was alive and was 24 years of age at the time of his examination. We have in addition to these instances the adoption of Mul Chand by Musammat Kishen Dei, the widow of one Ganeshi Lal, which was proved to our satisfaction in the case of *Manohar Lal v. Banarsi Das*.

These exhaust the instances which have been relied on in addition to those proved in the case of *Manohar Lal v. Banarsi Das*. We have only now to deal with a few cases coming from the Jaipur State.

It would appear from the judgment that the pleader for the defendant in argument placed no reliance on these cases, but the evidence was relied on for the appellant before us and was read to us and we think that it has some value as showing that the Agarwala Jains in the Jaipur State, which borders upon the Agra district, adopt married men. Bachu Lalji described himself as the adopted son of Lala Ram Chanderji of Jaipur State. His natural father's name was Dhannua Lal. He deposed that married boys belonging to the family were adopted amongst the Agarwala Jains and that there was no age limit. He stated that the tying of turban on the head

of the person, who is to be adopted was equivalent to an adoption. He himself was 30 years old and a married man when the turban was tied on his head in token of his adoption.

Another Lala Bachu Lalji, the adopted son of Lala Debi Lalji of the same State also deposed to the practice of adoption amongst the Jains. He stated that his natural father's name was Sheobakhsh, that Debi Lalji by whom he was adopted was Manaj Ram's son; that in his family married boys were adopted. Lala Lalji Mal also deposed that married boys were adopted amongst the Jains and that he was adopted by Mangal Lalji after his marriage, as were also two persons of the name of Basanti Lal and Gopi Lal. Lala Kishori Chandji deposed that Jains Agarwalas and Bishnus both adopted married and unmarried boys and there was no limit to age. He himself was adopted by Lala Chhote Lalji. He stated that Bachu Lal, Chait Mal and Baijnath Choudhry were adopted after marriage, that Bachu Lal was adopted when he was 25 years old, Chait Mal when he was 30 years old and Baijnath when he was 45 years old. The witness attended, he said, the adoption ceremony of Baijnath. Another witness Lala Sobha Lalji deposed to the same practice and stated that he himself was adopted after his marriage by his paternal uncle, Govind Ram, and that he became the owner of Govind Ram's property. He also deposed to the adoptions of Bachu Lal by Debi Lal and Makhan Mal by Narsingh Lal after their marriages. The ritual of adoption amongst these Jaipur Jains is unlike that which prevails amongst the Jains in this Province. According to the evidence of these witnesses it consists of the tying of a turban on the head of the adopted boy. The fact, however, that amongst Agarwala Jains in Jaipur State marriage is no bar to adoption is suggestive as showing that amongst them the restrictions imposed by the Brahmnical priests and prevailing amongst Hindus proper are not regarded as binding upon the branch of the Jain community.

Not including the Jaipur instances, we have thus established to our satisfaction upwards of 30 instances of the adoption of married boys amongst the Jains in the Saharanpur, Muzaffarnagar, Meerut, Delhi and Karnal districts. The evidence given in support of 16 of these instances is un rebutted,

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in 13 instances the adopted sons themselves gave evidence in proof of their adoption and showed that they had got the property of their adoptive fathers. In 5 instances either the adoptive or the natural father gave evidence in support of the adoption.

The proof in some instances is stronger than in others, but we think that in all, with the exception of those, which we have rejected as not satisfactorily proved, it is sufficient to satisfy an unprejudiced mind beyond reasonable doubt.

The number of instances so proved is remarkable in view of the smallness of the Jain population in this province. Ordinarily unmarried boys would be selected for adoption, the choice of a married boy being the exception. We pointed out in *Manohar Lal v. Banarsi Das* that there is no restriction in the matter of age to be found in Manu or the Smritis and that the adoption of a married man of whatever age is not forbidden by the Mitakshara and that there is no religious significance attached by the Jains to adoption. It is not the case of the plaintiff, respondent that the rules of orthodox Hindus in the matter of adoption are applicable to the Jains. This case could not be set up, seeing that the ceremonies of investiture with the sacred thread and of tonsure are unknown to the Jains and that adoptions with the Jains are purely secular matters while with the Hindus proper they have a religious significance. As we have pointed out their Lordships of the Privy Council exposed the infirmity of the fundamental proposition laid down by Mr. Justice MITTER, that the institution of adoption was an essentially religious institution. We have shewn that in several respects the practice prevailing amongst the Jains, as regards adoption, materially differs from that of Hindus proper. For example it has been held that amongst them a widow is competent to adopt without the sanction of her husband (*Maharaj Gobind-nath Roy v. Gulab Chand*,<sup>(15)</sup> In *Sheo Singh Rai v. Dakho*<sup>(16)</sup> it was held that a sonless widow can adopt a son without the authority of her husband. In *Lakhmi Chand v. Gatto Bai*<sup>(17)</sup> the authority of a Jain widow to make a second adoption on the death of the child first adopted was established.

(15) [1833] S. D. A., 276.

(16) [1878] I. L. R., 1 All., 688.

(17) [1886] I. L. R., 8 All., 319.

Again it has been held that a Jain widow may adopt a daughter's son. In Bombay, indeed, it was held that according to the Hindu Law in force in that Presidency the adoption of a married Asagothra Brahman was not prohibited (*Dharma Dagu v. Ram Krishna Chinnaji* <sup>(18)</sup>). It is only when we come to comparatively modern works such as the Dattika Mimansa and Dattika Chandrika that we find restrictions imposed on adoption. These restrictions were undoubtedly the works of the Brahmanical priests of later times. Their Lordships of the Privy Council in the case of *Radha Mohun v. Hardai Bibi*, to which we have already referred, pointing to the antiquity of the Smritis as compared with the Dattika Mimansa and Dattika Chandrika, observe that they "had occasion in a late case to dwell upon the mixture of morality, religion, and law in the Smritis. *Rao Balwant Singh v. Rani Kishori* <sup>(19)</sup>. They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing." They then said:—"All these old text books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law, Sir William Macnaghten says:—it by no means follows that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the "*vinculum juris*" and the "*vinculum purdoris*" is not always discernible. They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts, which are meant to appeal to the moral sense and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society and impart to it an inflexible rigidity never contemplated by the original law givers." This is weighty and suggestive language. Again treating of the

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(18) [1885] I. L. R., 10 Bom., 80.

(19) [1897] L. R., 25 I. A., 69.

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weight to be attached to the Dattika Mimansa and Dattika Chandrika, their Lordships at page 474, referring to the view expressed by KNOX, J., that the authority of these works was open to examination, explanation, criticism, *etc.*, while not accepting this view observe that "so far as showing that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge." Now in view of the fact that the Jains dissented from Hinduism more than 2½ centuries ago at a time, when so far as the authorities go, no trace of the restriction of marriage existed in the matter of adoption and seeing that in primitive times the practice of adoption had no religious basis; also in view of the fact, which is admitted that the practice of adoption amongst the Jains is necessarily unlike that observed amongst the Brahmans and Vaishiyas, as we have already pointed out, it might be thought that the *onus* of proving the existence of a restriction upon adoption in the case of the Jains such as prevails amongst Hindus proper lay upon the party making this assertion. In view however of the ruling of their Lordships of the Privy Council that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation, we have treated this burden as one which lay upon the defendant appellant. This *onus* he has, in our judgment, satisfied and we remain of the opinion which we expressed in *Manohar Lal v. Banarsi Das* that the marriage of a Jain is no bar to his adoption.

We therefore allow the appeal. We set aside the decree of the court below and give a declaration that Jambu Prasad was adopted by Musammat Asharfi Kunwar and that his adoption is valid and we dismiss the plaintiff's suit with costs in both Courts including fees in this court on the higher scale.

S.

*Appeal decreed.*

## FULL BENCH.

SADDU

*versus*

BEHARI SINGH.\*

*Landlord and tenant—right of tenant in the abadi on partition between co-owners—not affected—liability to pay rent—ejectment.*

A partition between the co-owners cannot injuriously affect the rights which a tenant possessed before a partition took place.

Where under a partition between two co-owners the agricultural holding of a tenant fell to the share of one co-owner and his house in the *Abadi* in the share of the other *held* that he continued to hold the house site as an appurtenant to his holding and could not be ejected.

*Held*, further that he was not liable to pay rent for his house site to the co-owner in whose share his house had fallen. *Panna v. Nazir Husain*, A. W. N., 1902 p. 60 doubted. *Dharam Singh v. Bhoolar*, 2 A. L. J. R., 588 ; *Sundar Lal v. Chajjoo*, A. W. N., 1901, p. 112, referred to.

SECOND APPEAL from a decree of D. R. Lyle Esq., District Judge of Moradabad, reversing a decree of Pandit Mohan Lal Hukku, Munsif.

Suit for ejectment.

The plaintiff was a zemindar of Mauza Bharatpur of which the defendant was a tenant. A partition was effected between the zemindars and the defendant's holding fell in the mahals of a third party, while part of the *abadi* in which the defendant's house was situate fell in the mahal of the plaintiff. The defendant continued to reside in the plaintiff's *mahal* and cultivate the land in another mahal. The plaintiff asked the defendant to pay rent for the site of the house, and on defendant declining to do so, sued for the possession of the site of the house. The court of first instance dismissed the suit, but the appellate court reversed the decree, and decreed the suit.

Defendant appealed.

The case was referred to a Full Bench and was first heard by KNOX, A. C. J., AIKMAN and DILLON JJ., who remitted

\* S. A. 961 of 1906.

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certain issues to the court below. The lower appellate court returned the following findings of fact, *viz.*—

- (1) that the defendant was an occupancy tenant of at least 40 years' standing.
- (2) that he had been in possession of the house in question since the same period.
- (3) that there was no evidence of any contract under which the defendant built the house, or of the circumstances under which he was allowed to build it.

*Iswar Saran* (for *Tej Bahadur Sapru*), for the appellant. Having regard to the findings, the appellant cannot be turned out as he is a tenant whose tenancy is subsisting. Partition between the land-holders cannot affect the rights of the tenant.

*Dharam Singh v. Bhoolar*, [1905] 2 A.L.J.R., 588.

What all the zemindars in a body could not do, could not be done by the plaintiff alone. A tenant who is allowed to build a house in the *abadi* for his occupation cannot be turned out so long as he does not abandon the village and maintains the house. He cited.

*Nazir Husan v. Shibba*, [1905] I.L.R., 27 All., 81.

*Raj Narain v. Budh Sen*, [1904] I.L.R., 27 All., 338.

*Sri Girdhariji Mahuraj v. Chote Lal*, [1898] I.L.R., 20 All., 248.

*Dalal v. Bhuggu*, [1894] I.L.R., 16 All., 181.

*Sundar Lal* (with him *Baldeo Ram Dave*). The whole question is whether the appellant is entitled to retain the land for ever without paying us any rent.

[AIKMAN, J. If the village had not been partitioned would you have any right to recover rent?]

[BANERJI, J. When he had been holding the site for 40 years as has been found in this case would there be no presumption that the occupation of the house site and his tenancy of the lands cultivated by him are parts of the same transaction?].

There is no presumption of law one way or another. It can not be presumed that the site of the house and the cultivatory land were granted under one common contract. This allegation, like any other must be proved by the party who makes it. The defendant pays rent for the cultivatory holding to the zemindar who now owns that land, but pays nothing for the use

of our land. If both were held under the same contract for payment of one rent, the portion of the rent paid for the use of the site of the house would have been allocated to the plaintiff. This is not so. He is only a licensee of the site of the house, and the license has been legally countermanded in this case. Where the contract broke up and the house site went to one man and the village site to another, the ruling in

*Panna v. Nazir Husain*, [1902] A. W. N., 60.  
would apply.

If he was a licensee, as I submit he was, he can be turned out at our pleasure. He has not proved any contract and it must be assumed that he is a licensee.

*Iswar Saran*, was not heard in reply.

The following judgments were delivered :—

KNOX, J.—I agree with the view taken by my learned brother BANERJI and also in the order proposed by him. As pointed out by him in his judgment, the learned advocate for the respondent based much of his argument upon the case of *Panna v. Nazir Husain* (1). I was one of the Judges, who decided that case and as the result of the further argument addressed to us in this case, I think that the view taken in that appeal is open to question. It will, however, be sufficient to consider this when a case similar to that arises. In the present case, as pointed out by my brother BANERJI, the occupation of the house by the defendant is to his agricultural holding, and so long as the holding subsists, he is, in the absence of any provision to the contrary, entitled to occupy the house until the agricultural holding is determined.

BANERJI, J.—The suit, which has given rise to this appeal, was brought by the respondent, who is one of the zamindars of the village Bharatpur, a hamlet of Daribal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house is situated in a portion of the *abadi* of the village which has fallen into the share of the plaintiff by partition. The defendant cultivates land in

(1) [1902] A.W.N., 60.

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another *mahal* of the same village, under a different proprietor. The plaintiff seeks to eject him from his house on the ground that he refuses to pay ground rent for the site of the house. The court of first instance dismissed the suit, but the lower appellate court has reversed the decree of that court. The defendant has preferred this appeal.

The learned Judge of the Court below has found upon issues referred to him that about 30 years ago, that is, about the year 1877, the village lands and sites were divided by perfect partition into *mahals*, namely, *mahal* Chunni and *mahal* Har Sukh; that at the time of that partition, the site of the house occupied by the appellant was allotted to *mahal* Har Sukh, while the land cultivated by him was allotted to *mahal* Chunni and that *mahal* Har Sukh belongs to the plaintiff, and the other *mahal* to another proprietor. The learned Judge has further found that before this partition, the house occupied by the defendant was erected, and the land now in his cultivation was held by his predecessor in title; that the defendant and his predecessor in title have occupied the house in dispute for at least forty years, and that they have been the tenants of the land cultivated by them for at least that period. The learned Judge also holds that although there is no direct evidence that the site of the house was occupied as part of the contract of tenancy, it may reasonably be presumed that the predecessor of the defendant was permitted by the zemindar to occupy the site to enable him to carry on his cultivation. Upon these findings which must be accepted in this appeal, it is clear that the house of the defendant is appurtenant to his agricultural holding. So long, therefore, as that holding subsists, he is not liable to be evicted from his house. It is true that since the partition of the village, he holds his agricultural holding under a different proprietor from the owner of the *abadi* in which his house lies, but a partition between co-owners cannot injuriously affect the rights which he possessed before the partition took place. This was the view held in *Dharam Singh v. Bhoolar* <sup>(1)</sup>. The learned advocate, for the respondent has referred us to two rulings of this court which he contends support the case of the respondent. Those are the

(1) [1905] 2 A.L.J.R., 588.

cases of *Sundar Lal v. Chajju* <sup>(2)</sup>, and *Panna v. Nazir Husain* <sup>(3)</sup>. The first case, is clearly distinguishable from the present. In that case, a tenant had his dwelling house in one village and his cultivatory holding in another. It was found that he held the land occupied by his dwelling house as a licensee from the plaintiff. It was held that the license could be and had been revoked. The other ruling is, no doubt, to some extent in favour of the respondent. But with great respect I feel myself unable to follow it. That was a suit by the zemindar to eject certain agricultural tenants from the site of their houses in the *abadi* on the allegation that they were trespassers, and had recently built on land which had lapsed to the zemindar. It was found that the allegation of trespass was false, and that the houses in dispute had been built about 25 years before suit with the implied permission of the then zemindars at a cost of at least Rs. 300. It was held that the defendants were not tenants of the land on which their houses stood, and that they were not even licensees. If, as found, in that case, the defendants built their houses with the implied permission of the zemindars, I fail to see why they could not be regarded as licensees. The grant of a license may be express or implied from the conduct of the grantor; (Section 54, Act No. V of 1882), and if there was an implied grant, by the owner of a right to do something on his property which would, in the absence of such right, be unlawful, the right so granted would be a license (Section 52). In the present case, however, the defendant is not a licensee merely of the site of his house. He holds it as an appurtenant to his agricultural tenancy, and cannot be ejected during the existence of his tenancy. I would allow the appeal, set aside the decree of the court below, and restore that of the court of first instance dismissing the suit with costs.

AIKMAN, J.—I agree with my learned colleagues in thinking that this appeal must succeed.

The appellant is an occupancy tenant in the village of Dhari-bal. In a partition made at the instance of the co-sharers, his agricultural holding fell to one co-sharer, whilst the site of the house in which he and his predecessors in title had lived for at

(2) [1901] A.W.N., 42.

(3) [1902] A.W.N., 60.

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least forty years, fell to the lot of another co-sharer, namely, the plaintiff respondent. The latter demanded ground rent from the appellant for the site of the house, and on the appellants refusal to pay, instituted the suit out of which this appeal arises, asking that the defendant be ejected from the site, and ordered to remove the materials of the house within a time to be fixed by the court, or that the plaintiff may be given possession of those materials at a price to be fixed by the court. The Munsif dismissed the suit. On appeal, it was decreed by the District Judge. The defendant comes here in second appeal.

It is clear that the demand of the plaintiff for ground rent was not based on any contract to pay ground rent. The amount of rent, which the plaintiff demanded, was, it is true, not a large amount, but it was an amount arbitrarily fixed by him. In my opinion, the *onus* lies on him to prove that he is entitled to demand ground rent from the defendant, and this he has failed to discharge.

It may, I think, be taken as settled law, that before the partition, the zemindars as a body could neither have demanded ground rent from the defendant or his predecessor in title, nor have ejected him from his house, and I fail to see how by effecting a partition amongst themselves, they could acquire a right which they did not previously possess, when the village was undivided. This view is in accordance with that expressed by BLAIR, J. in *Dharam Singh v. Bhoolar* <sup>(1)</sup>, which decision, was affirmed in Letters Patent Appeal.

If the view adopted by the learned District Judge were approved, it would place in the hands of zemindars a powerful weapon against their tenants, and would go far to nullify all the enactments of the Legislature for securing fixity of tenure to agricultural tenants.

I may add that I entirely agree with my brother BANERJI in his observation regarding the case *Panna v. Nazir Husain* <sup>(2)</sup> relied on by the learned advocate for the respondent. With all respect for the learned Judges, who decided that case, I do not think the decision was right.

(1) [1905] 2 A. L. J. 588.

(2) [1902] A. W. N., 60

The order of the court. The appeal is decreed, the decree of the court below is set aside and that of the court of first instance restored with costs both here and in the court below.

X.

*Appeal decreed.*

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v.

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*Aikman, J.*

## FULL BENCH.

MUNIR-UN-NISA AND OTHERS

*versus*

AKBAR KHAN.\*

CIVIL.

1908.

*February, 17.  
April, 8.*STANLEY, C. J.  
BURKITT, J.  
AIKMAN, J.

*Limitation Act (XV of 1877), article 132—Unpaid vendor's lien—Statutory charge—Transfer of Property Act (IV of 1882), section 55—Payment of prior incumbrance by vendee—Liability of vendee.*

A claim by a vendor for the enforcement of payment of purchase money by sale of the purchased property is a statutory charge differing from the lien which an unpaid vendor in equity possesses for the recovery of the balance of his purchase money. The articles of Limitation applicable to such a suit is 132 and not 111. *Har Lal v. Muhamdi*, I. L. R., 21 All., 454; *Rama Krishna v. Subrahmania*, I. L. R., 29 Mad., 305, approved and followed.

SECOND APPEAL against the decree of L. M. Stubbs Esq., District Judge of Saharanpur, modifying a decree of Babu Nihal Chandra, Subordinate Judge.

Suit for sale upon a mortgage.

The material facts appear from the judgment.

The court below decreed the suit.

Defendant appealed.

*Gokul Prasad* (for *B. E. O'Connor* and *Ishaq Khan*), for the appellants, relied on the following cases.

*Harlal v. Muhamdi*, [1899] I. L. R., 21 All., 454.

*Chand Mal v. Angan Lal*, [1891] A. W. N., 130.

*Vir Chand v. Kumaji*, [1892] I. L. R., 18 Bom., 846.

*Chunni Lal v. Bai Jethi*, [1897] I. L. R., 22 Bom., 846.

*Webb v. Macpherson*, [1903] I. L. R., 31 Cal., 57.

*A. E. Ryves* (with him *Abdul Raoof* and *Tej Bahadur Sapru*), for the respondent.

The judgment of the Court was delivered by

\* S. A. 990 of 1906

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v.

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*Stanley, C. J.*

STANLEY, C. J.—This appeal arises out of a suit brought by a vendor to enforce payment of the balance of his purchase money by sale of the purchased property. The main question raised in the appeal is whether or not article 111 of schedule II to the Limitation Act or article 132 is applicable to the case. Article 111 provides for a suit brought by a vendor of immoveable property to *enforce his lien for unpaid purchase money*, and the period given for the institution of a suit under that article is three years. Article 132 provides for a suit to enforce payment of money charged upon immoveable property, the period allowed for the institution of such a suit being 12 years. It is admitted that if article 111 is applicable to this case, the suit is barred; but if article 132 applies, the suit has been brought within time.

The respondent's case is that the suit is not a suit to enforce a lien within the meaning of article 111 but is a suit to enforce a statutory charge created by section 55 of the Transfer of Property Act. The courts in this country have taken varying views upon this question, the Bombay High Court holding that article 132 was the article applicable to a case of the kind, whilst until quite recently the Madras High Court held that the article applicable was article 111. In this High Court there were also conflicting decisions. In the case of *Buldeo Pershad v. Jit Singh* <sup>(1)</sup>, EDGE, C. J., and TYRRELL, J., held that article 111 was applicable. But in a later case, we find in a carefully considered judgment, delivered by the late SIR ARTHUR STRACHEY, the Court consisting of himself and BANERJI, J., a ruling that article 132 applied. This was the case of *Har Lal v. Muhamdi* <sup>(2)</sup>. In a recent case in the Madras High Court, *Rama Krishna Ayyar v. Subrahmania Ayyar* <sup>(3)</sup>, the question was again considered, and in view of a statement of the law by their Lordships of the Privy Council in a recent case, to which we shall presently refer, the Court held, over-ruling the previous decisions, that article 132 was the article applicable to a suit of the kind. The case, to which the learned Judges in that case referred, is the case of *Webb v. Macpherson* <sup>(4)</sup>. In that case, their Lordships at pages 71 and 72 referred to section 55

(1) [1891], A. W. N., 130.

(3) [1905], I. L. R., 29 Mad., 305.

(2) [1899], I. L. R., 21 All., 454.

(4) [1903], I. L. R., 31 Cal., 57.

of the Transfer of Property Act, which provides that "in the absence of a contract to the contrary \* \* \* \* the seller is entitled, where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money, or any part thereof, remaining unpaid, and for interest on such amount or part."

A number of English authorities were cited to their Lordships in that case, and dealing with these authorities, they observed at page 72:—"No doubt English cases might be useful for the purpose of illustration, but it must be pointed out that the charge, which the vendor obtains under the Transfer of Property Act, is different in its origin and nature from the vendor's lien, given by the Courts of Equity to an unpaid vendor. That lien was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case, there is a statutory charge. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood, when Equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge, therefore, stands in quite a different position from a vendor's lien." In view of this language of their Lordships, it appears to us that we must take it as settled that a claim such as that referred to in the present case for the enforcement of the payment of purchase money by sale of the purchased property is a statutory charge differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase money, and that, therefore, the article of the Limitation Act applicable to this suit is article 132.

A minor question which has been raised in the appeal is that the suit having been dismissed as regards one of the defendants Nazir Husain, he should have been exempted from the payment of costs. In view, however, of the relationship of Nazir Husain to the vendee, this is not a case in which we should interfere with the decision of the court below on the question of costs.

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The only other remaining question which has been brought to our notice is the following, namely, it is alleged by the vendee that she paid in respect of prior incumbrances upon the purchased property a considerable sum of money, exceeding, we are told, the balance of the purchase money due by her, and she claims a right to set off the money, so paid, against a like amount of the purchase money. The deed of purchase has been translated for us and so far as we can gather there is no provision in it that the vendee should be liable to pay off subsisting charges. On the contrary, the property appears to have been sold free from incumbrances; certainly there is no mention of any existing incumbrances. One of the duties of a vendor as prescribed by section 55 of the Transfer of Property Act is to discharge amongst other things all incumbrances on the property existing at the date of the sale; except where the property is sold subject to incumbrances. It therefore appears to us that the vendee is entitled, if she paid any prior incumbrance, which the vendor was liable to pay, to set off the amount so paid against a proportionate part of the balance, remaining unpaid, of the purchase money or against the entire balance, if the amount so paid was equal to or exceeded the balance. Whether or not any money has been paid in respect of prior incumbrances by the vendee has not been ascertained. The learned District Judge says in the course of his judgment that "if it be found that the defendant appellant is entitled to a set off on this head, it will be necessary to have this point determined, as the lower court has recorded no finding upon it." In the view, which the learned District Judge took, he did not go into this question. We think he ought to have done so, and before we finally determine this appeal, we must refer an issue under the provisions of section 566 of the Code of Civil Procedure for determination by him. The issue will be:—

Whether or not at the date of the sale to the vendee appellant any incumbrances on the purchased property were outstanding, and if so, whether the defendant vendee has paid any and if so what amount in discharge of those incumbrances?

We accordingly refer this issue to the lower appellate court, and we shall ask that court to determine it with the utmost expedition. The court will take such relevant evidence as the parties may tender. On return of the finding, seven days will be allowed for filing objections. We shall reserve the question of costs for the final hearing.

[The District Judge on the issues referred found that sums amounting in the aggregate to Rs. 3,839-12-3 had been paid by the defendant, musammat Munir-un-nisa in discharge of prior incumbrances affecting the property which she had purchased. The amount of the claim of the plaintiff for unpaid purchase money being only Rs. 3,600, a balance of Rs. 239-12-3 would be due to the defendant. The property affected by the incumbrances included other property than that sold. Their Lordships, however held that the defendant was entitled as against the plaintiff, who was bound to discharge these incumbrances to set off the entire amount so paid by her. The plaintiff could, if so advised, realise from the owners of other properties who were liable to pay up the incumbrances, the proportionate amount of the mortgage debt attributed to other properties. The learned counsel for the appellant having undertaken to waive her right to the balance Rs. 239 odd and make over to the plaintiff any mortgage deeds which she had satisfied, the appeal was decreed and the plaintiff's claim dismissed with costs].

*Appeal decreed.*

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SERH MAL

*versus*

BHAIRON PRASAD.\*

*Code of Criminal Procedure (Act V of 1898), sections 195-439—Power of High Court—Order by Judge refusing to set aside an order sanctioning prosecution—Revision—Order not specifying the place and occasion of offence—defective.*

When a Sessions Judge refuses to interfere in the order of a Magistrate sanctioning prosecution, the High Court has power to call for and examine the record and pass such orders as a court of appeal could have passed, under section 195 of the Code of Criminal Procedure. *Kusal v. Badri*, A.W.N., 1907, p. 283; *Muthuswami v. Veeni*, I.L.R., 30 Mad., 382, referred to.

C. R. 71 of 1908.

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CRIMINAL.

1908.

March 16.

AIKMAN, J  
KARAMAT  
HUSAIN, J



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 v.  
 BHAIRON PRASAD.

An order sanctioning prosecution did not specify the court or other place, in which and the occasion on which the offence was committed, *held*, that the order was defective.

APPLICATION to revise an order of J. L. Johnston Esq., Sessions Judge of Banda, confirming an order of Munshi Gada Husain, Magistrate of the 1st Class of Banda.

Application for sanction to prosecute.

One Binda brought a charge against Bhairon Prasad, under section 454, Indian Penal Code. After a protracted trial, the Assistant Magistrate of 1st Class acquitted the accused. Serh Mal was one of the witnesses for the prosecution examined in the case. Bhairon Prasad applied for sanction to prosecute Serh Mal, under sections 211 and 193, Indian Penal Code. The Assistant Magistrate granted sanction under section 211 but refused sanction under section 193, Indian Penal Code. On appeal, the Sessions Judge confirmed the sanction, under section 211 given by the Assistant Magistrate and granted sanction, under section 193 refused by the Assistant Magistrate.

Serh Mal applied to the High Court to revise the order.

*C. Dillon*, for the Petitioner. As regards sanction under section 211, granted by the Assistant Magistrate, and confirmed by the Judge, under section 195, Criminal Procedure Code, the High Court has power to interfere under section 439 independently of section 195 of the Criminal Procedure Code. He relied upon

*Mathuswami v. Veeni*, [1907] I.L.R., 30 Mad., 384.

*Nazir Husain v. Dost Muhammad*, [1903] I. L. R., 26 All., 1.  
 and Criminal Revision No. 612 of 1907.

*Salig Ram v. Ramjilal*, [1906], A. W. N., 103.

*D. C. Banerji*, for the opposite party, relied upon

*Kusal v. Badri*, [1907] A. W. N., p. 283.

and contended that the rule laid down in that High Court has no power to interfere, when sanction is granted or refused by the 1st Court and the order has been confirmed by the Judge in appeal under section 195, Criminal Procedure Code. He submitted that the case in 30 Mad., 384, was wrongly decided, and the case in I.L.R., 26 All., 1, was over-ruled by Full Bench in I.L.R., 28 All., 554. Even if High Court had independent power under section 439, it could not interfere on the merits but only if the order was wrong or illegal.

The judgment of the Court was delivered by

AIKMAN, J.—A Magistrate of the first class in the Banda district, on the application of one Bhairon Prasad, granted sanction for the prosecution of applicant Serh Mal, for an offence punishable under section 211 of the Indian Penal Code. Serh Mal applied to the learned Sessions Judge to revoke this sanction. The learned Judge declined to interfere. Serh Mal then applied to this Court in revision, and the record was sent for under the provisions of section 435 of the Code of Criminal Procedure.

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—  
*Aikman J.*

The first question we have to consider is whether the Court can interfere in revision. We have been referred to a decision of a learned Judge of this Court in *Kusal and others v. Badri Prasad*, (1). With the opening part of that judgment, we are in full agreement. If section 195 stood alone in the Code, we are of opinion that this Court would have no right to interfere in the case. With all deference to the learned Judges, who decided the case, *Muthuswami Mudali v. Veem Chetti* (2), we are unable to hold that when a Sessions Judge refuses to interfere with a sanction granted by a Magistrate, under section 195 of the Code of Criminal Procedure, this refusal to interfere is equivalent to the giving of a sanction for the purposes of the section. We agree with what was said by WALLIS, J., in the referring order in that case. But in the case of *Kusal v. Badri Prasad*, the learned judge went on to hold that in a case like the present, this Court has no power of interference, even under section 439 of the Code. With the utmost respect for the learned Judge, this is a view, which we are not prepared to adopt. It is a view, which, so far as we know, has not been taken either by this Court or by any other Court. We have been referred to an unreported case, Criminal Revision No. 612 of 1907, which is similar to the present case. In that case, the application for revision was admitted by the same learned Judge, who decided the case, *Kusal v. Badri Prasad*, and was ultimately granted by another learned Judge of this Court. There can be no doubt that section 435 gives this Court power to call for and examine the record of a proceeding such as in this case was before the courts below, and that power is given in order that this court may satisfy itself of the correctness, legality or

(1) [1907] A. W. N., 283. (2) [1907] I. L. R., 30 Mad., 382

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propriety of any order passed in the case. We do not think it could have been the intention of the Legislature, that when a High Court under the powers conferred on it by section 435, calls for the record of a proceeding, it can only express an academic opinion as to the legality or propriety of the order, and cannot give effect to its opinion. Section 439, sub-section (1) provides that when the High Court has called up a case like the present, it may in its discretion exercise any of the powers conferred on a court of appeal by section 195 of the Code. We are of opinion that this Court is thereby vested with the power to deal with the order of the Magistrate in the same way as the Sessions Judge might have dealt with it, under section 195 clause (6). We hold therefore that there is no bar to our dealing with the case in revision.

Coming to the merits of the case, we are of opinion that the order sanctioning the prosecution of the applicant, for an offence under section 211 of the Indian Penal Code, cannot be maintained. The order itself is defective, inasmuch as it does not specify the court or other place, in which and the occasion on which the offence was committed. We should not have been inclined to interfere solely on the ground of this omission, but the learned Advocate for the opposite party is unable to refer us to anything upon the record, which in the slightest way supports the idea that Serh Mal committed an offence under section 211 of the Indian Penal Code. The learned Advocate, for the opposite party asks us to treat the case as if it were a sanction, given for the prosecution of the applicant, for the abetment of an offence under section 211. This we decline to do. But in order to save the applicant from further proceedings, we feel bound to state that we are unable to discover any material, sufficient to justify the prosecution of the applicant, for the offence of abetment. We allow the application, and revoke the sanction given by the Magistrate, on the 2nd of September, 1907, for the prosecution of Serh Mal for an offence, under section 211, Indian Penal Code.

B.

*Sanction revoked.*

## SHER SINGH

*versus*

## SRI RAM AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), section 266—Right to get profits in future years—Attachment.*

The decree-holders applied for attachment of profits then due to their judgment-debtor from the lambardar as well as profits which would accrue at a future date. *Held* that in the profits of future harvest, the judgment-debtor had only a possible right to get a share, and this possible right was not liable to attachment having regard to the provisions of section 266 of the Code of Civil Procedure. *Hari Das v. Baroda*, I.L.R., 27 Cal., 38; *Udoy Kumari v. Hari Ram*, I.L.R., 28 Cal., 483; *Syad Tafazzul Husain v. Raghoonath Pershad*, 14 M.L.A., 40; *Jones v. Thompson*, 27 L.J.Q.B., 234; *Webb v. Stenten*, 11 Q.B., 578, referred to.

SECOND APPEAL against the order of D. R. Lyle Esq., District Judge of Moradabad, confirming an order of Shaikh Maula Bakhsh, Subordinate Judge.

Application for execution of decree.

The material facts appear from the judgment.

*Tej Bahadur Sapru*, for the appellant.

*Sarat Chandra Chaudhri* (for *Gokul Prasad*), for the respondents.

The cases cited are all referred to in the judgment.

The judgment of the Court was delivered by

AIKMAN, J.—The respondents, decree-holders, in execution of a money decree, which they had against the appellant, applied for the attachment of the profits, which were then due to him from the lambardar of the village on account of the *khari* harvest of 1313 Fasli, and also for the attachment of the profits, which would become due to him, but were not due at the time of the attachment on account of the *rabi* harvest of the same year. The judgment-debtor objected. His objections were over-ruled by the court of first instance, whose decision was affirmed by the learned District Judge.

\* E.S.A., 1213 of 1906.

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1908.

March, 16.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

Aikman, J.

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Aikman, J.

The judgment-debtor comes here in second appeal. The learned advocate, for the appellant, confines his appeal as to the question as to the right to attach the *rabi* profits. In support of his appeal, he relies on the cases, *Hari Das Acharjia Chowdhry v. Baroda Kishore* <sup>(1)</sup>, *Udoy Kumari Ghatwalin v. Hari Ram Shaha* <sup>(2)</sup>. These cases are not exactly on all fours with the present, but there are observations in the judgments, which are in favour of the appellant. Reliance is also placed on the decision of the Privy Council, in *Syad Tuffuzzul Hossein Khan, v. Rughoonath Pershad*, <sup>(3)</sup>. We have referred to various English authorities and these too support the appellant's contention. In the case, *Jones v. Thompson* <sup>(4)</sup>, it was held that the mere fact that it is most probable that there will be a debt is not sufficient. There must be an actual debt. On this principle it appears—See the case, *Webb v. Stenton* <sup>(5)</sup>—that the English Judges refuse to make orders attaching rent before it becomes due. In the case of *rabi* profits, here it is quite clear that there was no existing debt, there was a mere possibility that there might be money due to the judgment-debtor for profits when the account for *rabi* harvest were made up. In our opinion, this possible right of the judgment-debtor was not liable to attachment, having regard to the provisions of section 266 of the Code of Civil Procedure. Reference was made in the course of the argument to attachment of salaries not yet due; but for these special provision is made in the section. We allow the appeal so far as it relates to the attachment of the profits of the *rabi* harvest of 1313 Fasli, and we set aside the attachment of the right to recover those profits. In other respects, the appeal fails. Having regard to the result, we direct that the parties bear their own cost here and in the courts below.

*Decree modified.*

(1) [1899] I. L. R., 27 Cal., 38.

(2) [1901] I. L. R., 28 Cal., 483.

(3) [1871] 14 M. I. A., 40.

(4) 27 L. J. Q. B. D., 234.

(5) 11 Q. B. D., 518 at 523.

## TUHI RAM

*versus*

IZZAT ALI AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), sections 310A., 311, 320—Government rule 17(XII)—Person whose immoveable property has been sold—One co-sharer—right to apply—deposit by one co-sharer, pending an application to set aside the sale.*

One of several co-sharers of property which has been sold, is a "person whose immoveable property has been sold within the meaning of section 310A, Civil Procedure, and has a right to apply to set aside the sale and that it is not necessary to join all the co-sharers in the application.

When a deposit is made by one of the co-sharers, it is the duty of the Collector to pass an order setting aside the sale and the fact that an application by the other co-sharer to set aside the sale on the ground of material irregularity, under section 311 was pending is no bar to the making of the deposit and getting the sale set aside on that ground.

*Net Lall v. Sheikh Kareem Bux*, I. L. R., 23 Cal., 686, *Paresh Nath v. Nabo Gopal*, I. L. R., 29 Cal., 1, referred to

FIRST APPEAL against the decree of H. David Esq., Subordinate Judge of Meerut.

Suit to confirm a sale.

The court below dismissed the suit.

Plaintiff appealed.

*Moti Lal Nehru* (with him *J. N. Chaudri*), for the appellant.

*Sundar Lal*, for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—The matters, which have led to this appeal, are shortly as follows :—One Muttan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral, and this portion was sold by the civil court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September, 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October, 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and

\* F. A. 99 of 1906.

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STANLEY, C. J.  
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consequent loss of a substantial nature, and praying that the sale should be set aside under Rule 17 (XII). On the 19th October following, one of the defendants Abdul Hai, also a co-owner applied to the Collector under Rule 17 (XIII) to have the sale set aside, depositing at the same time in court a sum equal to 5 per cent of the purchase money and also the amount of the decree. His application was rejected by the Collector, on the 11th of November, 1904, on the ground, so far as we understand the order, that there was pending an application by Izzat Ali, to have the sale set aside on the ground of material irregularity in the conduct of it. The Collector seems to have held that Abdul Hai, one of the owners of the property could not apply under Rule 17 (XIII A), so long as there was pending an application on the part of another co-owner under Rule 17 (XII). In his order the Collector says "It has been urged that he *i.e.*, Abdul Hai, is only a mortgagor under the second mortgage represented by the amount of Rs. 2,234-8-0, and that Izzat Ali is a mortgagor under the first mortgage also represented by the amount of Rs. 24,632, that they are therefore different persons. I am unable to accept this contention. They are both judgment-debtors and originally joint defendants in the suit, and I hold that Abdul Hai is not entitled to make the application under section 310A, unless the application under section 311 is withdrawn". He, therefore, as the application of Izzat Ali had not been withdrawn, rejected the application of Abdul Hai. We do not profess to understand exactly the meaning of the language used by the Collector, but we take it that he refused the application of Abdul Hai on the ground that he alone was not a person who could apply under Rule 17 (XIII A). We may point out that by oversight he cited in his order section 310A, and section 311 of the Code of Civil Procedure instead of Rule 17 (XIII) and 17 (XIII A) of the Rules of Government passed under section 320. An appeal was preferred to the Commissioner of Meerut Division with the result that allowing the appeal, he set aside the order confirming the sale. In consequence of this order the present suit was instituted.

The rules to which we have referred are rules framed by the Local Government, under section 320 of the Code of Civil Procedure, for regulating the sale of ancestral lands by the Collector. Rule 17 (XIII A) corresponds with section 310A

of the Code. The court below dismissed the plaintiff's suit and hence this appeal.

It was argued before us at considerable length that no appeal lay from the Collector's order to the Commissioner but in the view which we take of the case, it is unnecessary to determine this question. It appears to us that when Abdul Hai deposited the money required to be deposited under the rule in question, the Collector was bound to pass an order, setting aside the sale and had no option in the matter. The language of the rule is as follows :—

“If such deposit is made within 30 days, the Collector *shall pass an order setting aside the sale*”. But it is said that the *proviso* to the section justified the Collector in passing the order now impeached. That proviso is that if a person applies under Rule 17 (XII) to set aside the sale of his immoveable property, he shall not be entitled to make an application under this Rule, (that is Rule 17 (XIIIA)). The contention is that inasmuch as Izzat Ali, one of the co-owners made the application to which we have referred under Rule 17 (XII), Abdul Hai could not in view of the language of the section succeed in an application to have the sale set aside under Rule 17 (XIIIA). It is said that “any person whose immoveable property has been sold” must mean all the owners of the property and not a single co-sharer, and that Abdul Hai being only a co-sharer, without the concurrence of the other co-sharers, could not take advantage of the rule. We are unable to take this view of the section. It appears to us that the words “any person whose immoveable property has been sold” enable a co-sharer of property which has been sold to apply to the court to have the sale set aside, and that it is not necessary that all the co-sharers should join in the application. So soon as Abdul Hai made his application and paid the money as required by the rule, it was in our opinion the duty of the Collector to pass an order setting aside the sale. He ought not, after the deposit was made, to have entertained the application which was made by Izzat Ali. We are confirmed in this view of the section by two decisions of the Calcutta High Court, namely in, *Net Lall Sahu v. Sheikh Kareem Bux* <sup>(1)</sup> and *Paresh Nath Singha v. Nabogopal*

(1) [1896] I. L. R., 23 Cal., 686.

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IZZAT ALI.

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*Chattopadhyaya* (2). Whether or not therefore an appeal lay to the Commissioner, we are of opinion that the Collector acted *ultra vires* in proceeding to confirm the sale after Abdul Hai had made the deposit and filed an application to have the sale set aside under the provisions of Rule 17 (XIII A). We, therefore, dismiss the appeal with costs including fees in this Court on the higher scale.

*Appeal dismissed.*

(2) [1901] 1. L. R., 29 Cal., 1.

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1908

March, 17.

STANLEY, C. J.  
BURKITT, J.

GOVIND PERSHAD

*versus*

GOMTI AND OTHERS.\*

*Hindu Law—Religious Endowment—Powers of a Hindu testator to place limitations—Bequest followed by endowment.*

Disputes having arisen about the management of a temple between D, the founder of the endowment, and others, the matter was referred to arbitration. The arbitrators decided that D should be the manager of the temple but made no provision as to who was to succeed him. *Held*, that the founder of an endowment had an inherent right to appoint his successor in the absence of any express provision to that effect. D executed a document by which he reserved the life estate in his property to himself and which was to devolve on his daughter after his death, and he directed that it was to be applied to the temple after her death. *Held*, there was no objection to the limitations by a Hindu testator or settlor or a life estate followed by an endowment of property to religious or charitable purposes, such limitation not being contrary to the rule laid down by the Privy Council in the Tagore Case.

FIRST APPEAL against a decree of Pandit Kuwar Bahadur, officiating Subordinate Judge of Shahjahanpur.

Suit for cancellation of a *tamliknama*.

The facts appear from the judgment.

*Abdul Majid*, for the appellant.

*Govind Prasad* (with him *Sital Prasad Ghosh*), for the respondents.

The judgment of the Court was delivered by

Stanley, C. J.

STANLEY, C. J.—Of the two grounds of appeal pressed before us in argument, the first is that Dwarka Prasad had no power under Hindu Law, or under the award

\* F. A. 161 of 1906

of the 28th of May, 1879, to appoint the defendants 2-4 as *Mutwallis* of the temple in the pleadings referred to, and that their appointment was invalid. It appears that there were disputes in regard to that temple, and the matters in difference were referred to arbitration. An award was passed on the 28th of May, 1879, which provided that Dwarka Prasad should be the Superintendent and Manager of the temple. There appears to be no provision in the award for the appointment of a successor to him. We only find in it a direction that if any of the representatives of Dwarka Prasad act dishonestly in regard to the management of the temple, another representative should be competent to defray such expenses and manage and supervise the endowment. The award further provides that if all the heirs and representatives of the Superintendent turn out dishonest, the management should be under the supervision of the Government. Dwarka Prasad, it has been found, was the founder of the temple, and as such he would have an inherent right to appoint successors, in the absence of any express provision for such appointment. We find, as we have said, in the award, no provision for the appointment of a successor, and therefore it appears to us that Dwarka Prasad was entitled as he purported to do in the *tamliknama* of the 2nd of July, 1904, to appoint superintendents in succession to himself.

The second point raised in appeal was that there was no valid endowment under the *tamliknama* of the 2nd of July, 1904. By that document, Dwarka Prasad preserved to himself a life estate in the endowed property and gave the property after his death to his daughter for her life and after her death, directed that it should be applied on the temple, that is, for the purposes of the existing endowment. It was contended by Mr. Abdul Majid, on behalf of the appellants that the limitation of the property after the life estates was contrary to the Hindu Law, and was void. He relied upon the ruling in the well-known Tagore case. We are of opinion that the limitation in this case is in no way contrary to the rule, laid down in that case by their Lordships of the Privy Council. There is no objection so far as we are aware to the limitation by a Hindu testator or settlor of a life estate, followed by an endowment of property to religious or charitable purposes.

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GOVIND PRASAD

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Stanley, C. J.

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*Stanley, C. J.*

The learned Subordinate Judge was of opinion that the suit was premature, and therefore dismissed it. In that opinion, we do not concur but we think that Govind Prasad is not entitled to maintain the suit, and that it ought to have been dismissed on the merits. We, therefore, dismiss the appeal with costs including fees in this Court on the higher scale.

*Appeal dismissed.*

CIVIL.  
 1908.  
*February, 25.*  
 AIKMAN, J.  
 KARAMAT  
 HUSAIN, J.

## SHEO PRASAD AND ANOTHER

*versus*

## INDAR BAHADUR SINGH AND OTHERS.\*

*Limitation Act (XI of 1877), schedule II article 179 (4)—Process fee—payment without application to issue proclamation—Fresh start—Step in aid of execution.*

An application for attachment was resisted by certain persons whose objections were dismissed. The suit brought by them was decreed on appeal by the District Judge. While the second appeal by the decree-holders was pending in the High Court, the decree-holders made an application for the arrest of the judgment-debtors. This application was made more than three years after the application for attachment, but within three years of the payment of process fees on that application. While paying the process fees, no application was made to issue a sale proclamation. *Held*, that the mere payment of process fee was not a step in aid of execution and did not give a fresh starting point to limitation. *Thakur Ram v. Katwaru Ram*, I.L.R., 22 All., 358, referred to. *Vijiaraghavalu v. Srinivasulu*, I. L. R., 28 Mad., 399, distinguished.

When attachment is issued on an application for execution and objections are preferred by an objector, the application for attachment and sale remains in suspense until the application and the suit, if any, brought by the objector is decided, after which the decree-holder may proceed with his application.

APPEAL against a decree of Shah Amjad-ullah, Subordinate Judge of Mirzapur.

Application for execution of decree.

The material facts appear from the judgment.

*William Wallach* (with him *Gokul Prasad*), for the appellants.

*Sundar Lal*, for the respondents.

The judgment of the Court was delivered by

\* E. F. A. 140 of 1907.

AIKMAN, J.—This is a decree-holder's appeal in proceedings arising out of the execution of the decree. An application was presented within time for attachment of certain house property. An objection was filed to this attachment, which was rejected on the 18th December, 1903. On the 12th of January, 1904, the objectors instituted a regular suit. In consequence of this suit, the court postponed the sale of the property and struck off the application. On the 7th September, 1904, the suit was dismissed, but on appeal, it was decreed by the District Judge.

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—  
1908.  
—  
SHEO PRASAD  
v.  
INDAR BHADUR.  
—  
*Aikman, J.*

The decree-holders preferred a second appeal to this Court, which has been decided in their favour. Whilst the case was pending in this Court, the decree-holders, as a matter of precaution, applied for the arrest of the judgment-debtors. This application has been rejected by the court below on the ground that there had been no application to the court to take any step in aid of the execution, within three years previously to the application for arrest. The decree-holders come here in appeal. The learned counsel, who appears for them, relies on the payment of process fees, made on his application to attach the house, within three years of the present application to arrest. In support of this case, he refers to a decision of the Madras High Court—*Vijiaraghavalu Naidu v. Srinivasulu Naidu* (1). That case is in our judgment distinguishable from the present, as it appears that the document, along with which the process fees were deposited, did ask the court to issue a sale proclamation: it clearly, therefore, fell within the language of article 179 (4) of the second schedule of the Limitation Act. In this case when the process fees were paid, no application was made to the court to do anything. The decision of our brother BANERJI in *Thakur Ram v. Katwaru Ram* (2), supports the view taken by the court below, and with that decision we are in accord.

At the same time, we are of opinion that the order, now under appeal, has not the effect of deciding that the decree has become time-barred. As said above, the application to attach and sell the house property was made within time. The granting of that application was suspended, not from any fault of the decree-holders, but owing to the institution of the suit referred to above.

(1) [1905] I. L. R., 28 Mad., 399. (2) [1900] I. L. R., 22 All., 358.

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INDAR BAHADUR.  
Aikman, J.

That suit has been finally decided in the decree-holders' favour by this court, on the 5th January, 1907, and the dismissal of the application for arrest made while the application for attachment and sale was in suspense will not, in our opinion, have the effect of preventing the decree-holders from exercising their right, now that the suit instituted by the objectors has been decided in their favour, to ask the court to go on with the application for attachment and sale, which must be deemed to have been in suspense, pending the decision of the suit. The order under appeal, however, cannot successfully be assailed, and we dismiss this appeal. Under the circumstances, we make no order as to costs.

*Appeal dismissed.*

CIVIL.

1908.

February, 29.

BANERJI, J.  
RICHARDS, J.

THAKUR PRASAD AND ANOTHER  
*versus*  
GAURIPAT RAI AND ANOTHER.\*

*Guardians and Wards Act (VIII of 1890), Ss. 55, 29, 31—Interest, rate of—Bond by guardian with permission of the Judge—Duty of Judge while giving permission.*

*Held*, that while giving permission to a guardian to borrow money for the purposes of the minor, the Judge is bound to specify the rate of interest, and the amount to be borrowed. These should not be left to the discretion of the guardian.

A creditor is not bound to see to the application of the money borrowed with the permission of the Judge. It is only necessary for him to prove that he lent the money relying on the Judge's permission.

FIRST APPEAL against the decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur.

Suit for sale upon two mortgages.

The material facts appear from the judgment.

*Mohan Lal Nehru* (for *Madan Mohan Malaviya* and *Gulsari Lal*), for the appellants.

*Abdul Raoof* (with him *Iswar Saran*), for the respondents.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—This was a suit for sale upon two mortgages, dated respectively the 14th and the 18th of June, 1897. The mortgages were executed by Sripat Rai, as the guardian

\* F. A. 129 of 1906.

of the respondents, with the sanction of the District Judge. The amount of the first mortgage was Rs. 1,400, and that of the other Rs. 1,800, and they carried interest at the rate of Re. 1-8 per cent, permensem, that is, Rs. 18 per cent, per annum. The learned Judge, in granting sanction for the raising of the loans, permitted the guardian, Sripat Rai, to raise as much as he could by hypothecating a one anna share, though he directed the guardian not to spend more than Rs. 1,100 on the marriage of Gauripat Rai, the first respondent, for the expenses of which the loan was to be raised. The court below has found that the plaintiff actually paid Rs. 1,400, on account of the first bond. As for the second bond, it was represented to the Judge that Rs. 1,887, were required for redeeming certain ornaments, which had been pawned with one Kali Charan. The learned Judge sanctioned the raising of that loan, and the ornaments are said to have been redeemed. The court below allowed to the plaintiffs interest at the rate of 12 per cent, per annum, which it considered to be reasonable, and reduced the contractual rate, on the ground that the District Judge, in sanctioning the raising of the loans, did not specify the rate of interest, at which the loans were to be taken. The course adopted by the court below is justified by the ruling of their Lordships of the Privy Council in *Ganga Pershad Sahu v. Maharani Bibi* (1). We are of opinion that in all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction, not only the amount to be raised and the property to be mortgaged, but also the rate of interest or at least the maximum rate of interest, at which the loans are to be raised. This was not done by the learned Judge in this case, and, therefore, the plaintiffs are only entitled to a reasonable rate of interest. We see no reason to differ from the opinion of the court below that 12 per cent, per annum was a reasonable rate in the present case. This is the only question raised in the appeal of the plaintiffs. The appeal must, therefore, fail and we accordingly dismiss it.

The respondents have preferred objections, under section 561 of the Code of Civil Procedure to the effect that the court

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THAKUR PRASAD

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*Banerji, J.*

(1) [1884] I. L. R., 11 Cal., 379.

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1908.

THAKUR PRASAD  
v.

GAURIPAT RAI.

*Banerji, J.*

below should not have allowed to the plaintiffs a decree for Rs. 300, out of the amount of the first bond, and for Rs. 400, out of the amount of the second bond. It is alleged on their behalf that these amounts were not actually paid. The evidence on the point is not satisfactory. On the contrary, as the court below finds, the account books of the plaintiffs and the evidence adduced on their behalf prove the payment of the full amounts of the two bonds. As for Rs. 300, out of the amount of the first bond, which exceeded the amount which the District Judge had authorized the guardian to spend on the marriage of one of the minors, we think, having regard to the form of the order made, that the creditor is entitled to recover what he actually paid. As we have said above, the court below has found that the amount of the first bond was actually paid by the plaintiffs, and we see no reasons to come to a different conclusion. We, accordingly, dismiss the objections also. The appellants will pay the costs of the appeal and the respondents, the costs of the objections.

*Appeal and objections dismissed.*

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CIVIL.

1908.

*March 5.*KNOX, J.  
AIKMAN, J.

## THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

*versus*

### BASHARAT ULLAH AND ANOTHER\*

*Stamp Act (11 of 1899), sections 40 and 44—Duty and penalty—recovered from person filing documents—suit against Secretary of State, maintainability of.*

Certain documents insufficiently stamped were put in evidence by the representatives in interest of the executants. The Collector recovered from the persons filing them, the duty and penalty by sale of their property. *Held*, that the Collector's order was open to review by Revenue authorities, and no suit lay against the Secretary of State for refund of penalty realised. *Held* further, that the persons, who wish a document to be admitted in evidence, are the persons from whom a Collector can realise the duty and penalty, and if it is due from a third person, they can bring a suit and recover it from him.

SECOND APPEAL against the decree of Maulvi Muhammad Siraj Uddin, Judge of the Court of Small Causes at Agra.

\* S. A. 590 of 1906.

exercising the power of a Subordinate Judge, confirming a decree of Munshi Mahraj Singh Mathur, Munsif of Muttra.

Suit for a declaration that an attachment is invalid.

The facts of the case were as follows :—

The plaintiffs produced in the Court of the Munsif of Muttra in a proceeding, under section 331 of the Code of Civil Procedure, a sale-deed and a receipt of the year 1849, on plain paper in support of their claim. The Munsif impounded the documents, under section 33 (1) of the Stamp Act, and sent them to the Collector, under section 38 (2). The Collector called upon the plaintiffs to pay stamp duty and penalty, under section 40 (b), and took proceedings, under section 48, and attached their movable property. The plaintiffs sued to set aside the attachment as illegal or in the alternative for damages for wrongful attachment. The courts below decreed the claim, holding the attachment illegal.

Defendant appealed.

*A. E. Ryves*, for the appellant, contended that the suit was not maintainable, as the question of a Collector's power to levy stamp duty and penalty was subject to the control of the Chief Revenue authority alone, under section 56 of the Stamp Act. Further the attachment was not illegal, as the appellants had filed the documents and were liable to pay stamp duty and penalty. He referred to section 44 of the Stamp Act.

*D. C. Banerjee*, for the respondents, submitted that under section 48, all duties and penalties might be recovered by the Collector by distress and sale of movable property of the person from whom the same were due. In this case, the sale-deed and the receipt were in favour of appellant's grandfather. Under section 29, appellant's grand-father was liable. The Stamp Act nowhere lays down that the person producing the documents was liable, and a penal liability could not be enforced against a grandson on any principle of law. The suit was one to set aside an attachment by a revenue authority, or in the alternative for compensation for illegal attachment, and clearly maintainable. Articles. 21 and 35 (j) of schedule II of Small Cause Court Act referred to the documents which were never admitted in evidence and appellants never had the benefit of the documents filed by them.

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1908.

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*Knox J.*

The Collector's powers were confined within the four corners of the Act.

The judgment of the Court was delivered by

KNOX, J.—The plaintiffs, who are respondents to this second appeal, produced before the Munsif of Muttra two documents, one was a conveyance, and the other, a receipt. They wished the two documents admitted in evidence in support of their claim. Both the documents were documents executed in favour of the predecessor-in-title of the plaintiffs. The Munsif being of opinion that the documents were not properly stamped impounded them and sent them in original to the Collector, under the provisions of section 38, clause (2) of Act No. II of 1899. The Collector acting under section 40, clause (1) —(b) of the same Act, required from the plaintiffs payment of the proper duty together with a penalty. The plaintiffs did not pay the penalty, and the Collector put in force the provisions of section 48 of the same Act, and attached certain property of the plaintiffs. Thereupon the plaintiffs brought the suit, out of which this second appeal has arisen, for the release of the attached property and damages. The court of first instance ordered the release of the attached property, and the decree of that court was confirmed in appeal. Both the courts concurred in holding that the duty and penalty were not recoverable from the plaintiffs, but from the other parties to the deeds in question. The defendant, namely, the Secretary of State for India in Council, comes here in second appeal, and it is contended on his behalf that the courts below have erred in holding that the plaintiffs were not liable to pay the stamp duty and penalty required of them. In our opinion, this appeal must prevail. Section 40, clause (1) —(b) is silent as to the person from whom the payment of the proper duty and penalty is to be required.

If the Collector required it from the wrong person, his procedure was open to revision, as provided by chapter VI of this Act. No step was taken to review the Collector's order. Therefore the Collector was acting within the authority given him by section 48 in ordering the attachment. Further we are of opinion that as it was the plaintiffs, who wished the documents admitted in evidence in support of their claim, they are the persons, from whom the

Collector, in the first instance, can recover the duty and penalty required before the documents can be admitted in evidence. The provisions of section 44 are important as showing that when any duty or penalty has been recovered from any person, in respect of an instrument, and some other person was bound to bear the expense of providing the proper stamp, the person from whom the duty and penalty has been recovered shall be entitled to recover from such other person, the amount of the duty and penalty so recovered. We decree the appeal, and dismiss the suit with costs in all courts.

B.

*Appeal decreed.*

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SECY. OF STATF  
v.

BASHARAT ULLAH.

*Knorr, J.*

LACHMI NARAIN

*versus*

KALYAN DAS.\*

CIVIL.

1908.

*February, 7.*STANLEY, C. J  
BURKITT, J.

*Code of Civil Procedure, (Act XIV of 1882) section 266—Arrears of rent  
—Suit by auction-purchaser.*

Arrears of rent due under a sub-lease which under the contract were made payable to the lessor's zamindar constitute a debt due to the lessor which is liable to attachment and sale under section 266 of the Code of Civil Procedure.

SECOND APPEAL against the decree of H. J. BELL ESQ., District Judge of Aligarh reversing a decree of Pandit Bisheshar Nath Kak, Assistant Collector, first class of Etah.

The facts of the case were as follows :—

One Dambar, an occupancy tenant, executed a sub-lease of his holding by way of a *sar-i-peshgi* lease to Kalyan Das, one of the landholders of the village, on a rent of Rs. 109-2-0, which he was to pay to another landholder, Mohan Lal. Mohan Lal not having received his rent of the occupancy holding, sued Dambar, and got a decree. In execution of this decree, the rent due to Dambar from Kalyan Das was sold as a debt, and purchased by Lachmi Narain appellant. He then sued Kalyan Das for the rent purchased by him. The suit was decreed by

\* S. A. 895 of 1906.

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1908.

LACHHMI NARAIN

v.

KALYAN DAS.

the Assistant Collector but was dismissed on appeal simply on the ground that what was sold to the appellant was a right to recover damages which was not saleable under section 266(e).

Plaintiff appealed.

*Gulzari Lal*, for the appellant.

The respondent was not represented.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The respondent in this appeal is not represented before us. We have heard the argument of the learned Vakil for the appellant, and have read the judgment of the learned District Judge. It appears to us that the learned District Judge was wrong in reversing the decision of the court of first instance on the only grounds raised in the appeal before him. The first point as appears from the judgment was that “Dambar Singh and Kalyan Das did not stand in the relationship of landlord and tenant.” It is clear that the relationship of landlord and tenant was established between the parties by the lease, executed by Dambar Singh in favour of Kalyan Dass, at a rent of Rs. 109-2-0. It was nevertheless a lease because the arrangement was, for the convenience of the parties, that the rent should be paid not to Dambar Singh but to Mohan Lal, the other zemindar. The second point raised in appeal was that under the lease no rent was due by Kalyan Das to Dambar Singh, and that the failure of Kalyan Das to pay the rent to the zemindar *deh* did not entitle Dambar to sue him for rent but at the most to sue him for damages for breach of contract, for non-payment of rent. We can not agree with the learned Judge in holding that under the lease no rent was due to Dambar Singh. The lease was made by Dambar Singh, in favour of Kalyan Dass. Dambar Singh was the lessor, and as such entitled to the consideration, that is, the rent reserved by the lease. No doubt, probably for convenience sake, the rent was made payable to Mohan Lal, but on non-payment of it a debt arose in favour of Dambar Singh, which was attachable and saleable under the provisions of section 266, Civil Procedure Code. The arrears of rent were as a matter of fact sold and purchased by the plaintiff appellant. Under these circumstances, the court of first instance rightly decreed the plaintiff’s claim. We, therefore,

allow the appeal, and as the points to which we have referred were the only matters raised in argument before the lower appellate court we set aside the decree of the learned District Judge, and restore the decree of the court of first instance, with costs in all courts.

LACHHMI NARAIN

v.  
KALYAN DAS.—  
Stanley, C. J.

*Appeal decreed.*

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RAM PRASAD AND OTHERS

versus

MANMOHAN AND OTHERS.\*

CIVIL.

—  
1908.—  
April, 1.—  
AIKMAN, J.  
KARAMAT  
HUSAIN, J

*Hindu Law—Redemption—Foreclosure suit against father—Sons not made parties—Creditor having knowledge of their existence—Son's suit to redeem, maintainability of.*

The principle of the ruling in *Debi Singh v. Jia Ram*, 1. L. R., 25 All., 214, should not be extended to the cases where a mortgagee having knowledge of the existence of the sons of the mortgagor does not implead them in a suit for foreclosure and obtains a decree against the father alone. The sons, who were not made parties to the foreclosure suit, can maintain an action to redeem the property on the sole ground that they were not made parties to the suit. *Bhawani Prasad v. Kallu*, 1. L. R., 17 All., 537, referred to

FIRST APPEAL from an order of H. E. Holme Esq., District Judge of Jhansi, reversing a decree of Pandit Piyare Lal, Munsif of Lalitpur.

Suit for redemption.

One Phul Singh, who with his sons formed a joint Hindu family, made a mortgage by way of conditional sale of certain property which belonged to the family. The mortgage was made on 12th January, 1892, to the defendants. On 21st January, 1895, the mortgagees brought a suit for foreclosure against Phul Singh alone, although they were aware of the existence of the sons of the mortgagors. They obtained a decree for foreclosure and were put into possession in due course in process of execution between 1896 and 1897. In 1907, the surviving sons and the grandsons of the mortgagor brought the present suit to redeem the mortgage on

\* F. A. F. O. 88 of 1907

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—  
*Aikman, J.*

the sole ground that they had not been impleaded in the former suit. The defendants mortgagees contended that the suit was not maintainable. The court of first instance dismissed the suit. The lower appellate court reversed the decree, and remanded the case, under section 562, Code of Civil Procedure. The District Judge relied upon *Bhawani Prasad v. Kallu*, I. L. R., 17 All., 537.

Defendants appealed.

*Sarat Chandra Chaudhri*, (for *Satish Chandra Banerji*).  
The authority of

*Bhawani Prasad v. Kallu*, [1895] I. L. R., 17 All., 537.  
has been much discounted since the case of

*Debi Prasad v. Jia Ram*, [1902] I. L. R., 25 All., 214

The latter case lays down the rule of law that a Hindu son can not impeach the sale of joint family property simply because he was not a party to the suit of the mortgagee. It must be shown that the debt was either immoral or did not in fact exist. The principle of this case has been extended to the case of a suit for redemption after sale has taken place. The son cannot be heard to say that he was no party to the mortgagee's suit unless he can show that either the debt was immoral or was not contracted at all. The latter are the only grounds on which he can avoid the liability.

*Lal Singh v. Pulandar Singh*, [1905] I. L. R., 28 All., 182.

The present is a case of foreclosure, and it is submitted that there is no distinction in point of principle between a case in which a sale has taken place, and one in which the property has been foreclosed. In the case of a sale, the mortgagee may himself become the purchaser, and his position is not in any way different from an independent purchaser unless there is anything to the contrary. The question is what is the right of the son? The observations of the Privy Council are that all the right that he has got, not being a party to the suit or the execution proceedings, is either to try the nature of debt or the fact of the debt. If, instead of allowing the foreclosure proceedings to take place, the father had sold the property to the mortgagee, could the sons have claimed the right that they are now setting up? It is submitted that the Privy Council in the case of

*Nanomi Babuasin v. Mudhun Mohun*, [1885] I. L. R., 13 Cal., 21.

limited the son's rights only to the trial of the nature or the *factum* of the debt.

*Durga Charan Banerji* (with him *E. A. Howard*), for the respondent, was not called upon.

The judgment of the Court was delivered by

AIKMAN, J.—The appellant obtained a decree for foreclosure against one Phul Singh, who is father of some of the respondents and grand-father of the others. It is found that although the appellants had notice of the interests of the sons and grandsons, they did not implead them in the suit for foreclosure. The respondents brought the suit, out of which this appeal arises, asking to be given an opportunity to redeem the mortgage. They did not dispute their liability to satisfy the debt incurred by the mortgagor. The court of first instance held that the suit was not maintainable. On appeal, the learned District Judge held that it was, and sent the case back for decision on the merits. The present appeal has been preferred against this order of remand.

It is contended that we ought to apply to this case the principle of the ruling of the Full Bench in *Debi Singh v. Jia Ram* <sup>(1)</sup>. That was a case, in which the sons of a Hindu father sued to get back from innocent purchasers their share of the family estate, which had been sold in execution of a decree obtained upon a mortgage by their father in a suit, to which they were no parties. Their claim was based solely on the ground that they had not been parties to the suit, in which the decree was obtained. In the judgment of the learned Chief Justice in that case, which was concurred in by KNOX, J. stress is repeatedly laid on the fact that the plaintiffs wished to oust strangers—see pages 223, 225, and particularly 226 of the judgment. In this case all that the plaintiffs ask is that they should be given an opportunity to redeem the mortgage, which was foreclosed by the appellants, who knew of the plaintiff's interests and yet did not make them parties to the suit to foreclose. In our opinion, we should not be justified in extending the principle laid down in the case relied on, on behalf of the appellants to the present case. It was owing to the appel-

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*Aikman, J.*

(1) [1902] I. L. R., 25 All., 214.

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RAM PRASAD

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*Aikman, J.*

lant's failure to comply with the provisions of law that the respondents did not have an opportunity to redeem. In our opinion, the observations of BANERJI, J. in the Full Bench case, *Bhawani Prasad v. Kallu* (\*), at page 548 of the judgment, and the observations of EDGE, C. J. at page 562 and following pages are distinctly in favour of the view taken by the learned District Judge. The judgment of the Chief Justice in that case was concurred in by three other Judges, who took part in deciding the case. In our opinion, the appeal fails, and it is dismissed with costs.

S. C. C.

*Appeal dismissed.*

(2, [1895] I. L. R., 17 All., 537.

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1908.

March 3.

AIKMAN, J.

KARAMAT

HUSAIN, J.

GULZARI MAL

*versus*

KABIR-UN-NISA.\*

*Appeal—order of remand—after it is carried out—maintainability of.*

When an order of remand has been carried into effect before the filing of an appeal against that order, the appeal is not maintainable.

*Madhusudan v. Kamini*, I. L. R., 32 Cal., 1023. *Salig Ram v. Brij Bilas*, I. L. R., 29 All., 659, followed.

FIRST APPEAL from the order of Shaikh Maula Bakhsh, Subordinate Judge of Moradabad, reversing a decree of Babu Deoki Nandan Lal Sahi, Munsif.

Suit for pre-emption.

The facts material for the purposes of report appear from the judgment of the court. The court of first instance dismissed the suit. The lower appellate court reversed the decree and remanded the suit for trial on the merits. The suit was tried by the court of first instance which decreed it in plaintiff's favour. Thereupon the present appeal was filed against the order of remand.

*Ghulam Mujtaba*, for the respondent, raised a preliminary objection to the hearing of the appeal on the ground that the remand order had been carried out before the appeal was filed in this court. The cases cited are referred to in the judgment.

\* F. A. F. O. 5 of 1907.

*C. Ross Alston* (with him *Gokul Prasad*), for the appellant.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal from an order of remand. A preliminary objection to the hearing of this appeal is raised by the learned vakil, for the respondent. It appears that the order of remand, now appealed against, was passed on the 12th of November, 1905. Under that order, the case went to the court of first instance, and was by that court decreed in favour of the plaintiff respondent, on the 28th of January, 1907. The present appeal, though it bears an endorsement of the stamp reporter, dated the 19th of January, 1907, was not presented until the 29th January, 1907, one day after the decree in plaintiff's favour had been passed.

The appellants filed no appeal from the decree which had been passed against them. In support of his objection, the learned vakil, for the respondent, relies on a decision of the Calcutta High Court in *Madhusudan Sen v. Kamini Kanta Sen* <sup>(1)</sup> and on a decision of this Court in *Salig Ram v. Brij Bilas*, <sup>(2)</sup>. These decisions support the preliminary objection taken. Were the matter *res integra* there might be something to be said in appellants' behalf; but we are bound by the decision of this Court. When the case went back to the court of first instance, it was heard in the presence of the defendants who, we are told, adduced evidence. We consider that the defendants, if they intended to appeal from the order of remand, might well have asked the court of first instance to defer hearing the case until their appeal against the order of remand had been disposed of, but they did not do so. We are bound by the decision in the case of *Salig Ram v. Brij Bilas* mentioned above. We, therefore, sustain the preliminary objection and dismiss the appeal with costs.

*Appeal dismissed.*

(1) [1905] I. L. R., 32 Cal., 1023.      (2) [1907] I. L. R., 29 All., 659.

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March 26.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

## HAKIM SINGH AND ANOTHER

versus

RAM SINGH.\*

*Code of Civil Procedure (Act XIV of 1882), section 258—Payment out of Court—Recognition by court without certifying.*

If money due under a mortgage-decree under section 88 of the Transfer of Property Act is paid out of court and neither party takes steps to have it certified under section 258 of the Code of Civil Procedure, the court executing the decree is precluded from recognising the alleged payment out of court. *Vaidhivasamy v. Somasundaram*, 1. L. R., 28 Mad., 473, followed. *Hatim Ali v. Abdul Ghaffur*, 8 C. W. N., 102, dissented from. *Oudh Behari Lal v. Nageshar Lal*, 1. L. R., 13 All., 278, *Mallikarjunada v. Lingamurti*, 1. L. R., 25 Mad., 244, referred to.

SECOND APPEAL against the order of Mr. Muhammad Ishaq Khan, District Judge of Farrukhabad, modifying an order of Babu Shekhar Nath Banerji, Munsif of Farukhabad. Application for an order absolute.

The facts appear from the judgment.

Judgment-debtors appealed.

*Gulzari Lal*, for the appellants.

*M. L. Agarwala* (with him *Damodar Das*), for the respondents.

The judgment of the Court was delivered by

Aikman, J.

AIKMAN, J.—The respondent obtained a decree, under section 88 of the Transfer of Property Act, against the appellants, directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute, under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of court. This was denied by the decree-holder. The court of first instance found the payment proved, and made an order absolute for sale to recover the balance due after deduction of the amount paid out of court. The decree-holder appealed. He pleaded that no payment had been made to him out of court and further that it was not open to the court, having regard to the provisions of section 258 of the Code of Civil Procedure, to recognise the payment out of court. Without going into the first plea, the learned District Judge sustained

the second plea. The judgment-debtors come here in second appeal.

For the appellants it is argued that the provision of section 258 have no application to the case. Reliance is placed upon a decision of the Madras High Court, *viz.* *Mallikarjuna Sastri v. Narasimha Rao*, (1), and on a decision of the Calcutta High Court in *Hatim Ali Khundkar, v. Abdul Ghaffar Khan* (2). The former of these decisions has been overruled by a Full Bench of the Madras High Court in *Vaidhinadasamy Ayyar, v. Somasundram Pillai* (3). The latter case undoubtedly supports the appellants, but with all deference to the learned Judges, who decided it, we are unable to agree with them. The Full Bench case of the Madras High Court is in point and is against the appellants. We agree with the view taken in that case. We hold that the money alleged by the judgment-debtors to have been paid out of Court was "money payable under a decree," within the meaning of section 258 of the Code of Civil Procedure. If it was paid out of court and the decree-holder did not certify the payment, the judgment-debtors ought to have taken prompt steps, within the time allowed by the Limitation Act, to have the payment recorded as certified, but they failed to do so. It has been held by this Court in *Oudh Behari Lal v. Nageshar Lal* (4), and also by the Madras High Court in *Mullikarjunadu Seti v. Lingamurti Pantulu* (5), that applications for an order absolute are applications for the execution of the decree, under section 88. We are of opinion that the learned Judge was right in holding that the court was precluded by the last paragraph of section 258 of the Code of Civil Procedure, from recognising the alleged payment out of court. If the view taken by the Calcutta High Court were adopted, it seems to us that the execution of a decree might be delayed by repeated pleas of payment out of court, and that the court might have to try what would really be a series of different suits, arising out of the original decree. We dismiss the appeal with costs.

*Appeal dismissed.*

(1) [1901] I. L. R., 24 Mad., 412.

(2) [1903] 8 Cal., W. N., 102.

(3) [1904] I. L. R., 28 Mad., 473.

(4) [1901] I. L. R., 13 All., 278.

(5) [1901] I. L. R., 25 Mad., 244.

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*Aikman, J.*

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February, 18.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

## GOBIND DAS AND OTHERS

versus

SARJU DAS.\*

*Contract Act, (IX of 1872) section 25—Agreement to pay a barred debt—  
Express contract—Consideration valid.*

Defendant executed a *sarkhat* in favour of plaintiffs' firm, in respect of a barred debt due by him to the firm, stating that no interest was to be paid. *Held*, that in order to maintain the suit, it was necessary to show express promise to pay, and not only that the intention to pay was deducible from the language of the acknowledgment. *Held*, further that to hold that whenever there was a clear acknowledgment of a debt whether time barred or no, that was equivalent to a promise to pay upon which a suit might be maintained, would be to nullify the effect of section 19 of the Limitation Act. *Held*, further that under section 25 (3) of the Indian Contract Act, a promise, made in writing, and signed by the person to be charged therewith to pay a barred debt was a good consideration, but there must be a distinct promise and not a mere acknowledgment. *Mum Rum Seth v. Seth Rup Chand*, I. L. R., 33 Cal., 1047 (1058) distinguished.

SECOND APPEAL from the decree of G. A. Paterson Esq., District Judge of Benares, reversing the decree of A. Rahman Esq., Subordinate Judge of Benares.

Suit for money.

On the 2nd of November, 1899, Sarju Das, the defendant executed a note of hand in favour of the plaintiff's firm, acknowledging the sum of Rs. 995-10-0 to be due from him. Defendant did not pay anything under this note, and he executed another note on the 31st of October, 1902. Both the notes were to the same effect. The present suit was brought on the 2nd of November, 1905. The *sarkhat* was worded as follows: "*lekha Babu Madho Das, Babu Gobind Das ji ka—Rs. 995-10 anna baki dena, Miti Katik Badi Amawas, Sambat 1956, tain rupia 995-10 anna dena para. Badley men kabala makan ka Sakin Suria ka Sakunati abna rakh dia bila sudi.*"

\*S. A. 1260 of 1906.

(Account of Babu Madho Das, Babu Gobind Das—To give balance Rs. 995-10, up to *Katik Badi Amawas Sambat* 1956, Rs. 995-10 found due. In lieu title deeds of my residential house, Suria, deposited without interest.") The defence to the suit was that the notes of hand in question did not save limitation, nor could they form the basis of a suit. The Subordinate Judge, decreed the suit, but the District Judge on appeal dismissed it.

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#### Plaintiffs appealed.

*Tej Bahadur Sapru* (with him *Lalit Mohan Banerji*), for the appellant contended that the note of hand in suit contained an express promise to pay. The words *baki dena* meant 'I have to give' and if they did mean that, it was an express promise to pay. The fact that certain title-deeds were delivered to the plaintiffs by the defendant by way of security showed that the debtor undertook to pay the balance due. And, lastly, the words '*bila sudi*' 'without interest' showed conclusively, that the debtor agreed to pay this sum but without interest. If that was not so these words were meaningless. Why should the condition that no interest would be paid have been inserted if the debt was not to be paid at all? But if the bond did not contain an express promise to pay, the language of it was sufficient to imply such a promise. If a man acknowledged a certain debt, the presumption ought to be that he intended to pay it and not that he did not to pay it. He relied on

*Maniram Seth v. Seth Rupchand* (1906) I. L. R., 33 Cal., 1047 P. C.

Besides the *sarkhat* was sufficient as an acknowledgment. He referred to Stanley, J's judgment in

*W. R. Fink v. Baldeo Dass* (1899) I. L. R., 26 Cal., 715.

and contended that it was right in view of the law laid down in 33 Cal., 1047 and that the later Calcutta ruling in

*Benode Bihari Mookerjee v. Raj Narain Mitter* (1903) I. L. R., 30 Cal., 699, was open to doubt. According to the Privy Council, there was no difference between the English Law and the Indian Law in so far as an acknowledgment was a good acknowledgment for the purposes of a suit even though it did not contain promise to pay.

He discussed also

*Appa Rao v. Surya Prakasa Rao* (900) I. L. R., 23 Mad., 94.

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*Vasudeo Anant v. Ramkrishna Narayan* I.L.R., 24 Bom., 394 [1200].*Shankar v. Mukta* [1898] I. L. R., 22 Bom., 513.

*Durga Charan Banerji*, for the respondent, contended that the second note of hand could serve only as an acknowledgment and extend the time if only the first note was within 3 years from the date of the original debt, and there was nothing to show that this was the case. As a mere acknowledgment without a promise to pay, it could not form the basis of a suit. He relied on

*Ganga Prasad v. Ram Dayal* [1901] I. L. R., 23 All., 502.

He cited section 25 of the Contract Act and pointed out the difference between an acknowledgment, under section 19 of the Limitation Act, and a promise within the meaning of this section. He referred to Pollock and Mulla's Contract Act at page 131.

The ruling in 33 Cal., 1047 must be read in the light of the facts of the case and the observations of their Lordships should not be so read as to annul the provisions of section 19. With regard to the construction of the note, he submitted that the words *baki dena* which were construed in I. L. R., 8 Bom., 405, simply meant 'balance due.' They implied no agreement to pay.

*Tej Bahadur Sapru*, submitted in reply that the case in 23 All., must be read subject to their Lordships' decision in 33 Cal. It had not met with approval in Madras.

*Manjunatha v. Devamma* [1902] I. L. R., 26 Mad., 186.

He also referred to

*Vasudeo Anant v. Ram Krishna Rao Narayan* I. L. R., 24 Bom., 394.

The judgment of the Court was delivered by

*Aikman, J.*

AIKMAN, J.—The plaintiffs who are appellants, here come into court on the allegation that the defendant respondent on the 2nd November, 1899, executed a document described as a *sarkhat*, in favour of the plaintiffs' firm, in respect of an old debt of Rs. 995-10-0, due by him to the firm, and that in this document, he promised to pay the aforesaid sum without interest.

The plaint sets forth that again on the 24th of October, 1902, a similar document was executed by the defendant, promising to pay the aforesaid debt without interest. The plaintiff sued to recover the amount, due under this document. The defend-

ant pleaded that the document sued on was a mere acknowledgment and was not a promise to pay a time barred debt, and that the suit was not maintainable on the mere acknowledgment.

The court of first instance came to the conclusion on a consideration of the language of the document which is the basis of the suit that it was not a mere acknowledgment of a debt but that it contained a promise to pay the debt without interest. On appeal, the learned District Judge held that there being no clearly expressed promise in the *sarkhat*, the plaintiffs were not entitled to succeed and dismissed the suit. The plaintiffs come here in second appeal.

The first plea is that the *sarkhat* in question contains an express promise to pay the debt. We have carefully considered the language of the document, and we cannot find in it any promise to pay. The document no doubt states that up to a certain date so much is due without interest, and it refers to the deposit of the title deeds of a house in lieu of the debt (*Badli-main*).

The next plea in the memorandum of appeal is that so long as the intention to pay a time barred debt is clearly deducible from the language of a document, the creditor can maintain a suit, and it is not necessary that it should contain an express promise to pay. We can not accept this plea. It is probable that when the defendant executed the document he fully intended to pay the debt due from him but a suit cannot be based upon an unexpressed intention.

The learned advocate, for the appellants, relied strongly upon an expression in the judgment of their Lordships of the Privy Council in *Mani Ram Seth v. Seth Rup Chand*,<sup>(1)</sup> at page 1058, where their Lordships say "an unconditional acknowledgment has always been held to imply a promise to pay, because that is natural inference, if nothing is said to the contrary. It is what every honest man would mean to do."

If we were to give to this passage the wide meaning contended for and hold that whenever there is a clear acknowledgment of a debt whether time-barred or no that is equivalent to a promise upon which a suit may be maintained

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the result would be that the effect of the opening words of section 19 would be nullified. That section renders it necessary that the acknowledgment referred to therein must be made before the expression of the period prescribed for the suit. It is evident that in the case cited their Lordships had no intention of in any way departing from the clear meaning of the language of section 19. In the case before them, the acknowledgment was made before the statutory period had run out and their Lordships say "thus one requisite of section 19 is complied with." Under section 25 sub-section 3 of the Indian Contract Act, a promise made in writing and signed by the person to be charged therewith to pay a barred debt is a good consideration but there must be a distinct promise and not a mere acknowledgment.

In our opinion, the decision of the court below is right. We dismiss the appeal with costs including fees on the higher scale.

S.

*Appeal dismissed.*

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*March, 9, 10.*

AIKMAN, J.

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HUSAIN, J.

NIAZ AHMAD

*versus*

ABDUL HAMID.\*

*Code of Civil Procedure—(Act XIV of 1882), sections 43, 377—First suit for declaration of right and partition—Second suit for partition of joint property—Cause of action identical—First suit withdrawn—Second barred—Limitation Act (XV of 1877)—Art. 106—Suit for partition, a suit for a share in dissolved partnership.*

The plaintiff brought a suit for declaration that certain property in Moradabad District purchased by the defendant in his name was purchased with the money belonging to the parties and taken out of the partnership business of which the parties were joint owners and for partition of that property. This suit was withdrawn without permission to bring a fresh suit as the parties referred the matter in dispute to arbitration. The arbitration fell through and the plaintiff brought this suit for partition of certain property situate at Naini Tal which had been purchased in the joint names of the parties. In the plaint, he alleged that the property at Naini Tal was purchased with the profits of the partnership business. *Held*, that the cause of actions in both the suits were identical and the second suit was barred by

\* *Mis. 196 of 1907.*

section 43 of the Code of Civil Procedure, as the plaintiff ought to have included his present claim in the first suit. *Held*, further, that the suit was barred by section 373 of the Code. *Held* further, that the suit was also barred by article 106 of the Limitation Act inasmuch as it was a suit for a share in the profits of a partnership which had been dissolved more than three years before the suit.

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Reference by the Government under the Kumaun rules.

The facts of the case were as follows :—The plaintiff and the defendant owned a shop jointly at Naini Tal, which was carried on by the plaintiff and the defendant. The defendant purchased certain property at Moradabad in his name. Three shops were purchased at Naini Tal in the names of the plaintiff and the defendant. The plaintiff claimed partition of the Naini Tal property in this suit. The defence was that the suit was barred by (1) section 43 of the Code of Civil Procedure and (2) article, 106 of the Limitation Act. The material facts relating to this defence were that plaintiff brought a suit at Moradabad in 1901, for declaration that certain property standing in the name of defendant was the joint property of the parties and for partition of that property. He alleged that the defendant had fraudulently *purchased* that property in his own name with the money which belonged to the parties. During the pendency of that suit an agreement was drawn up for referring the matters in dispute between the parties to the arbitration of several arbitrators. The agreement was filed before the Deputy Commissioner of Naini Tal who referred the matter to arbitration. Some of the arbitrators did not join the arbitration. The umpire made the parties sign a compromise on 2nd June, 1902. Before the compromise, the plaintiff withdrew the Moradabad suit without leave to file a fresh suit. The defendant applied to file the compromise but the Deputy Commissioner dismissed the application. After some other proceedings, the High Court confirmed the Deputy Commissioner's order in 1904. (The judgment is reported in 1 A. L. J. R., 29). The plaintiff thereupon filed this suit on 12th December, 1905, for partition of Naini Tal property. The courts held that section 43 of the Civil Procedure Code and article 106 of the Limitation Act barred the suit. The plaintiff applied to the Government, who referred the following questions to the High



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Court, under Rule 17 of the Kumaun Rules which runs as follows :—

The Government may on the application of a party to the suit or of its own motion, refer to the High Court of Judicature for the North Western Provinces for its report and opinion any final decree of the commissioner which may seem to be open to objection on any of the grounds specified in section 584 of the Code of Civil Procedure and may thereafter pass such orders as may appear proper.

- (1) Whether having regard to the statements in the plaints of the suits filed in Moradabad and Naini Tal causes of action in both suits were one and the same?
- (2) Whether if there was a single cause of action in both suits, the plaintiff was bound to include the claim for the Naini Tal property in the suit filed in Moradabad, whether his omission to do so precludes the institution of the present suit?
- (3) Did the reference to arbitration in the Moradabad suit bar the trial of that suit, if it did, is the present suit affected or not by the provisions of section 43 Civil Procedure Code?
- (4) Does the withdrawal of the Moradabad suit without permission to bring a fresh suit under section 373, Civil Procedure Code, bar the present suit for the portion of the claim omitted in the previous suit?
- (5) Is the present suit barred under article 106 of the 2nd Schedule of the Limitation Act (XV of 1877)?

*Mohanlal Nehru* (with him *Motilal Nehru*), for the appellant. As a matter of fact there are only two questions for decision—first whether section 43 of the Civil Procedure Code bars the suit, and secondly whether the suit is barred by limitation, under article 106 of the Limitation Act. The causes of action in the Moradabad and Naini Tal suits were not identical. In the Moradabad suit, the cause of action was the fraudulent act of the defendant, in purchasing the property in his name alone with joint funds. In the present suit, the property stands in the name of both parties. There is no allegation of fraud. The plaintiff in his plaint at Moradabad stated that he could not sue in respect of Naini Tal property at Moradabad. There is authority in support of the view that if the properties were situated in different districts, the cause of action in respect of the property in one district could not be joined with the cause of action in respect of the property in another district.

*Balarum Bhaskarji v. Ramchandra Bhaskarji*, [1898], I. L. R., 22 Bom., 922.

But even if the plaintiff was wrong, the fact that he made a statement that the cause of action in respect of the other property had accrued to him would not debar him from now suing for that as he was not bound to include that in the former suit. The causes of action being different he was not bound to sue in respect of both the properties in the former suit.

*Riyat Ullah v. Nasir Khan*, [1884], I. L. R., 6 All., 616.

In the former suit the plaintiff wanted possession after partition. In the present case, he said that he was in possession but could not enjoy the property jointly with the defendant and wanted a division only. The parties were Mahomedans. They were not the members of a joint family but were tenants in common in respect of the property in dispute. A suit for partial partition was not barred.

*Lachmi Narain v. Janki Das*, [1901], A. W. N., 50.

If section 43 barred the suit the result would be, that the plaintiff would be obliged to enjoy the property jointly with the defendant in perpetuity.

*Ittappan v. Manavikrama* [1897], I. L. R., 21 Mad., 153 at 157.

[AIKMAN, J.—The plaint in the former suit shows that the plaintiff thought he could not sue in respect of Naini Tal property at Moradabad. Would the fact that he unintentionally relinquished the claim save the suit from section 43].

If there was a relinquishment, section 43 would apply but in the present case, there was no relinquishment at all.

[AIKMAN, J.—Was he not bound to sue in respect of the Naini Tal property at Moradabad?]

No. The provisions of section 19 of the Civil Procedure Code were not mandatory but directory only. The word used in section 19 was 'may' and not 'shall' which was used in other similar sections.

*Subba Rao v. Rama Rao*, [1867] 3 Mad., H. C., 376.

The question about section 373, Civil Procedure Code, did not arise. If section 43 did not bar the suit section 373 could not. Moreover the subject matter of the two suits were different.

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Article 106 only applied to suits for accounts and share in the partnership property. This was not a suit for account and share but a suit for partition of immovable property. The parties were partners so far that they were part owners of the property sought to be partitioned.

*Kassamal v. Gopi*, [1886], I. L. R., 9 All., 120 at 123.

Article 106 applied when the share was not ascertained. When the share was ascertained the ordinary limitation would apply. Under the Transfer of Property Act both parties became owners in equal shares. The plaintiff could bring a suit for partition within 12 years from the time when his right was denied. The finding was that partnership was dissolved in 1895. The suit would be within time if brought within 12 years from 1895.

*J. N. Chaudri* (with him *Sundar Lal*), for the respondent. The plaint in the Moradabad suit showed that the plaintiff intentionally omitted the claim about Naini Tal property. When the plaintiff omitted the claim in respect of that property he could not maintain the present suit, section 43 of the Civil Procedure Code being a bar. The cause of action in both the suits was the repudiation of his right as partner. Section 19 of the Code was an enabling section and enabling sections of that kind were of imperative nature. The plaintiff could not be compelled to claim the whole property at Moradabad but he must take the consequences of his omission,

*Har Chander Singh v. Lal Bahadur Singh*, [1894] I. L. R., 16 All., 359.

The causes of action in both the suits being identical *vis.*, dispossession, it was immaterial by what processes they came into existence. The plaintiff in both cases wanted possession of his share.

*Ukha v. Dagi*, [1882] I. L. R., 7 Bom., 182.

No permission under section 373 C. P. C. was asked for in the Moradabad suit. The second suit could not be maintained.

*Behari Lal v. Srimati Baran Mai*, [1898] I. L. R., 17 All., 53.

In applying section 43 regard must be had to the nature of the claim and the cause of action. The nature of the defence was not material.

Article 106 of the Limitation Act also barred the suit.

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The partnership property referred to in that article meant both real and personal property. If a share in partnership property was claimed that article would apply. That it was partnership property was evident from the fact that the plaintiff in his plaint admitted that the rent was deposited in the partnership shop and expenses were paid out of it. The plaintiff could only sue for dissolution of partnership and accounts. LINDLEY on Partnership, 7th Edition p. 361, 362, 377. If there was agreement at the time of purchase that a certain property would not be treated as partnership property, the case would be different.

The Judgment of the Court was delivered by

AIKMAN, J.—This is a reference by Government under rule 17 of the Kumaun rules, 1894, asking for the report and opinion of this Court on certain questions arising out of an appellate decree of the Commissioner of Kumaun. The case is a difficult one. After hearing it thoroughly and ably argued by the counsel on both sides, we reply as follows.

*Aikman, J*

In the suit filed in Moradabad, the plaintiff came into court alleging a partnership between himself and the defendant. He asserted that certain property had been acquired by the defendant out of the partnership funds and that it had been dishonestly entered by the defendant in his own name. He asked for a declaration that the property in question was partnership property and further asked to be put in possession of one-half of it. In that plaint, he referred to the existence of other property in Naini Tal and said that as he could not legally sue for it in the Moradabad court, he would bring a separate suit for it. The Moradabad suit was afterwards withdrawn by the plaintiff, no permission being given under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff afterwards filed in the court of the Deputy Commissioner, Naini Tal, the suit which has given rise to this reference. The suit is in regard to property which according to the statements in paragraph 1 of the plaint, and the evidence of the plaintiff was partnership property as defined in section 253 of the Contract Act. The plaintiff stated that he was in possession of this property and asked for a partition. In his plaint and in his evidence, the plaintiff alleged that he was in possession of

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the property in suit. The defendant denied that plaintiff was in possession. The Deputy Commissioner found that plaintiff was not in possession and this finding was not challenged by the plaintiff in his appeal to the Commissioner. The courts below held that the suit was barred under the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act.

The first question asked by the Government is whether having regard to the statements in the plaints of the suits filed in Moradabad and Naini Tal separate causes of action were disclosed or whether the cause of action in both suits was one and the same? We have carefully studied the plaints and in our opinion the cause of action in both suits was in reality one and the same, *viz.* a claim to property arising out of the relation of the parties as partners in the firm at Naini Tal.

The second question is :—"Whether if there was only a single cause of action in both suits, the plaintiff was bound to include the claim for the Naini Tal property in the suit filed in Moradabad, and whether his omission to do so precludes the institution of the present suit?" In our opinion, the plaintiff not only might but ought to have included his present claim in the first suit, and his omission to do so precludes the institution of the present suit.

The third question is :—"Did the reference to arbitration in the Moradabad suit bar the trial of that suit? If it did, is the present suit affected or not by the provisions of section 43 of the Code of Civil Procedure?" This question appears to be based on some misconception. The parties are agreed that no reference to arbitration was made in the Moradabad suit.

The fourth question is :—"Does the withdrawal of the Moradabad suit without permission to bring a fresh suit, under section 373, Civil Procedure Code bar the present suit for the portion of the claim omitted in the previous suit?" Having regard to our answer to the second question, we answer this in the affirmative.

The fifth question is :—"Is the present suit barred under article 106 of the Second Schedule of the Limitation Act (XV of 1877)?" Although the suit is not in terms, a suit for a share

of profits of a dissolved partnership, it is found by the courts below that the partnership was dissolved upwards of three years before the suit was instituted in Naini Tal, and as the plaintiff would not have been entitled to the relief he asked for without an account, and a finding as to his share of the profits of partnership, we hold that his present suit is barred.

This is our reply to the reference. In our opinion, the respondent is entitled to his costs in all courts, the costs in this Court to include fees on the higher scale.

N.

*Record returned.*

CIVIL

1908

NIZAZ AHMAD

v.

ABDUL HAMID.

*Aikman, J.*

BHANI MAL

*versus*

MAKKHAN LAL AND OTHERS.\*

*Execution of decree—Sale of immovable property—Purchased by decree-holder—Suit to obtain possession by assignee of auction-purchaser—Civil Procedure Code (Act XIV of 1882), section 244.—Practice Full Bench reference—Bench not constituted—Powers and duties of a Division Bench.*

Where in execution of a simple money decree certain property was sold and purchased by the decree-holder himself, and where after the confirmation of the sale the decree-holder failed to obtain possession of the property purchased, and it remained in the hands of the judgment-debtor, *Held*, that a suit by an assignee of the decree-holder for possession of the purchased land was barred by section 244, Code of Civil Procedure. *Kalyan Singh v. Thakur Das* 3 A. L. J. R., 234 followed.

*Semle*.—A Division Bench of the High Court made a reference to the Full Bench, but the Chief Justice refused to constitute a bench to hear the reference. *Held* that the Division Bench could rehear the case.

SECOND APPEAL from the decree of G. C. Badhwar Esq., Additional Judge of Saharanpur, affirming the decree of Pandit Kunwar Bahadur, Munsif of Deoband.

The facts of this case are shortly these: One Hargu Lal purchased the property in suit in execution of a simple money-decree of his against Musammat Munir-un-nissa, and Hamid-

\* S. A. No. 340 of 1907.

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1908.

*April, 15.*

KNOX, J.

AIKMAN, J.

KNOX, J.

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ullah, on the 20th September, 1894. The sale was confirmed on 23rd October, 1894, and on 23rd July, 1895, the sale-certificate was obtained. After Hargu Lal's death, his grandson Makhanlal sold the property, on 26th December, 1904, to the plaintiff, Bhani Mal. Bhani Mal brought the present suit for possession of the property against the judgment-debtors, Musammat Munir-un-nissa and Hamid-ullah. The courts below dismissed the suits as barred by the provisions of section 244, Code of Civil Procedure, relying on

*Sandhu Taraganar v. Hussain Sahib*, [1904] I. L. R., 28 Mad., 87

Plaintiff appealed.

*Lalit Mohan Banerji* (for *William Wallach*), for the appellant. Section 244 of the Code of Civil Procedure is not applicable as the question is not between the decree-holder or his representative on one side and the judgment-debtor or his representative on the other. The auction-purchaser is the representative of the judgment-debtor, and the question therefore is one between the judgment-debtor himself and his own representative.

*Maganlal v. Doshi Mulji*, [1901] I. L. R., 25 Bom., 631.

The fact that the decree-holder himself is the auction-purchaser makes no difference.

*Ghulam Shabbir v. Dwarka Prasad*, [1895] I. L. R., 18 All., 36.

The cases in the Calcutta High Court prior to the case

*Madhusudan v. Gobinda*, [1899] I. L. R., 27 Cal., 34.

are in favour of the appellant. The case of

*Katayan Singh v. Thakur Das*, [1900] 3 A. L. J. R., 234.

is against the appellant but it is submitted that that case has been wrongly decided. The question does not relate to execution, satisfaction or discharge of the *decree*, for the decree has already been fully executed, and there is no decree extant. The legislature contemplates a suit of this character, for it provides in Art. 138 of the Second Schedule of the Indian Limitation Act, 1877, that the auction-purchaser is competent to bring a suit against the judgment-debtor when he continues to remain in possession.

*Sarat Chandra Chaudhri* (for *Satish Chandra Banerji*, with *Abdul Raoof*), for the respondents. The question is concluded by the authority in *Kalyan Singh v. Thakur Das* <sup>(1)</sup>, and the judgment of the Chief Justice and BURKITT, J., in that case

supports the respondents and is on all fours with the present case. Reference was made.

*Sandhu v. Husain*, [1904] I. L. R., 28 Mad., 87.

The following order was made by the Court.

Our learned colleague in referring this second appeal to a Bench of two Judges says that he has considerable hesitation in accepting the decision of this court in *Kalyan Singh v. Bhagwan Das*. After hearing the arguments addressed to us on behalf of the appellant, we think it desirable that the question raised in this second appeal be decided by a Full Bench. We direct that the case be laid before the Hon'ble the Chief Justice for orders.

The papers having been laid before the Chief Justice, His Lordship passed the following order :

This reference comes to me under exceptional circumstances. In the case of *Kalyan Singh v. Thakur Das* a Division Bench composed of my brother Burkitt and myself decided after mature consideration the sole point which is involved in the case. The value of the present appeal is trifling being only Rs. 200, and the case being cognizable by a single Judge came before my brother Banerji. He had considerable hesitation in accepting the view expressed in *Kalyan Singh v. Thakur Das*, that is in following that ruling and referred the case to a Bench of two Judges. It came before my brothers Knox and Aikman with the result that they have referred it to me with the object of having it determined by a larger Bench.

In deciding the case of *Kalyan Singh v. Thakur Das* my brother Burkitt and I were supported by a decision of the Calcutta High Court in the case of *Madhusudan Das v. Gobinda Pria Chaudhurani* (1) and by the decisions of the Madras High Court in *Kasinatha Ayyar v. Uthumansa Rowthan* (2) and *Kattayat Pathumai v. Raman Menon*. The same question came before my brother Burkitt and myself in an appeal from my brother Aikman, under the Letters Patent, *Sheonarain v. Nur Muhammad*, No. 36 of 1907, decided on the 6th of December, 1907 which is unreported. In deciding that case my brother Aikman does not appear to have been aware of the decision in *Kalyan Singh v. Thakur Das*. He relied upon two cases in the Calcutta High Court,

(1) [1899] I. L. R., 27 Cal., 34. (2) [1901] I. L. R., 25 Mad., 529.

(3) [1902] I. L. R., 26 Mad., 740.

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*Knox J.*

namely, *Seru Mohun Bani v. Bhagoban Din Pandey* <sup>(1)</sup> and *Kishori Mohun Roy Chowdhry v. Chander Nath Pal* <sup>(2)</sup>.

In his judgment he observes "I have not been referred to any case in which an opposite view has been taken." In neither of those cases does it appear that the auction purchaser was the decree-holder.

We reversed his decision pointing out amongst other things that the Privy Council expressed approval of the fact that the High Courts in India had not put a narrow construction upon section 244. In the Full Bench case of *Gulsari Lal v. Madho Ram* <sup>(3)</sup>, in the course of his judgment my brother Banerji observed :

"It seems to me that every purchaser of the judgment debtor's interest who is bound by the decree is a representative of the judgment-debtor within the meaning of the section (*i.e.*, section 244) *et cetera*."

In the present case, the auction-purchaser was the decree-holder and therefore was bound by the decree. It seems to me desirable that there should be uniformity in the decisions of the different High Courts and in view of the decisions to which I have referred, I fail to discover any justification for my passing a special order in this case, particularly as it is one which was within the cognizance of a single Judge. The fact that my brother Banerji had some hesitation in accepting the ruling of my brother Burkitt and myself, however worthy of weight, does not seem to me in the circumstances of this case to justify a special order and therefore, I direct that the case be laid before the Bench by which it has been referred for determination.

The appeal was then laid before KNOX and AIKMAN, J. J.

The judgment of the Court was delivered by

KNOX, J.—This appeal came in the first instance before our brother Banerji who, observed that the ruling of this Court in *Kalyan Singh v. Thakur Das* was against the contention of the appellant but that he had considerable hesitation in adopting

(1) [1883] I. L. R., 9 Cal., 602.

(2) [1887] I. L. R., 14 Cal., 644.

(3) [1904] I. L. R., 26 All., 447.

the view taken in that case. He accordingly referred the case to a Bench of two Judges. It then came before this Bench. The learned vakil, for the appellant, pressed us with strong arguments regarding the desirability of the important question raised in the appeal being decided by a Full Bench of this Court. On the 20th December, 1907, we expressed an opinion to the effect that it was desirable that the question raised in this second appeal be decided by a Full Bench, and we directed that the case be laid before the Hon'ble the Chief Justice for orders.

The learned Chief Justice for reasons stated in the order bearing date the 10th of January, 1908, held "that it did not seem to him in the circumstances of this case to justify a special order, and he therefore directed that the case be laid before the Bench by which it has been referred for determination."

On the case coming back to us the learned vakil for the appellant argued that having once made an order of reference to a Full Bench, we had no jurisdiction to pass further orders in the case. He called our attention to the fact that in only one case had the request of a Division Bench of Judges to have a case referred to a Full Bench been refused by a Chief Justice (S. A. 644 of 1896), and that in that case on a further representation by the Judges who made the reference, a Full Bench was ultimately constituted.

We have no power to constitute a Full Bench and under the circumstances, we consider that we must hear the appeal.

The learned Vakil, for the appellant admits that the ruling in *Kalyan Singh v. Thakur Das*, cited in the referring order of our brother Banerji is against the appellant. That is a ruling of a Division Bench and in view of it, we hold that this appeal fails. We dismiss it with costs.

L. M. B.

*Appeal dismissed.*

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*Knox, J.*

## PRIVY COUNCIL.

T. P. PETHERPERMAL CHETTY

*versus*

R. MUNIANDY SERVAI AND OTHERS.

CIVIL

1908.

March, 18.

LORD MAC-  
NAGHTEN,  
LORD ATKINSON,  
SIR ANDREW  
SCOBLE,  
SIR ARTHUR  
WILSON.

*Benamée transaction, to effect a fraud—Object defeated—Right to recover possession—Instrument not operative—Setting aside of the instrument whether necessary—Limitation Act (XV of 1877), Art., 91, 144.*

In order to save his property from an equitable mortgagee one C executed a *benamée* deed of sale in 1895, in favour of the defendant. The equitable mortgagee brought a suit and got a decree against C, and his *benamée* transferee who paid him up. The representative of C brought this suit for possession of the property purported to have been sold. *Held*, that he was entitled to recover possession inasmuch as he was not carrying out the illegal transaction, but was seeking to put every one in the same position as they were in before that transaction was determined upon. Moreover the purpose of the fraud having been defeated there was nothing to prevent the plaintiff from recovering possession of his property. *Taylor v. Bowers*, 1. Q. B. D., 291; *Symes v. Hughes*, L. R., 9 Eq., 475; *In re Great Berlin Steam Boat Company*, 26 Ch., s. 616; *Kearley v. Thomson*, 24 Q. B. D., 742, referred to.

In conspiracy the concert or agreement of the two minds is the offence, the overtact is but the outward and visible evidence of it. Very often the overtact is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself be comparatively insignificant and harmless, but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must according to the authorities be effected. Then, and then alone, the fraudulent grantor or giver, loses the right to claim the aid of the law to recover the property he has parted with.

*Held*, further that the sale-deed of 1895 was not an operative instrument, and it was not necessary for him to have it set aside as a preliminary to his obtaining a decree for possession, and the suit was governed by article 144, and not 91 of the Limitation Act.

APPEAL from a decree of the Chief Court of Lower Burmah. The material facts are set out in the judgment. The Courts below decreed the suit.

Defendant appealed.

*Upjohn K. C.*, and *Baelhache K. C.*, for the appellant.

*L. DeGruyther*, for the respondent.

The judgment of their Lordships was delivered by

LORD ATKINSON.—In this case, an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the appellant (thereinafter called “Petherpermal, the elder”), and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government waste land No. 1 situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy, District Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12-0.

On the 11th June, 1895, Chellum Servai executed a deed purporting to be conveyance on sale of the above-mentioned lands to Petherpermal Chetty, the elder, a money-lender residing in Rangoon in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September, 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry deceased, and Petherpermal, the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance, Petherpermal, the elder, was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12-0 with interest, and other relief.

Petherpermal, the elder filed his defence, and, the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal, the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal, the elder procured

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a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June, 1895, was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July, 1897, R. Muniandy Servai and Petherpermal, the elder, executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case that the deed of the 11th June, 1895, was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was a "*benamée* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by Counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the Judge who tried the case and saw the witnesses, approved, as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions, therefore, for their Lordships' decision are—

1. Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

2. Is his right of action barred by the 91st Article of Schedule II. to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benamée* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law, (7th ed., p. 595, para. 446) the result of the authorities on the subject of *benamée* transactions is correctly stated thus:—

"446 . . . . . Where a transaction is once made out to be a mere *benamée* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a court should assist or permit B to cheat A. But if A requires the help of the court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded anyone, there can be no reason why the court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons, have been allowed to recover property which they had assigned away. . . . . where they had intended to defraud creditors, who, in fact, were never injured. . . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, *In pari delicto potior est conditio possidentis*. The Court will help neither party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

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The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor v. Bowers* (1), and the authorities upon which that decision is based clearly establish this. *Symes v. Hughes* (2), and *In re Great Berlin Steamboat Co.* (3), are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L. J., in *Kearley v. Thomson* (4).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

(1) [1876] 1 Q. B. D., 291.

(2) [1870] L. R., 9 Eq. 479.

(3) [1884] 26 Ch. D., 616.

(4) [1890] 24 Q. B. D., 742.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

*Appeal dismissed.*

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MAL CHETTY

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SERVAL

*Lord Atkinson.*

## HIGH COURT.

NANHE MAL

*versus*

HARJAS.\*

*Small Cause Courts Act (IX of 1887), section 25—Revision—Powers of High Court—Civil Procedure Code (Act XIV of 1882), sections 108, 622—Setting aside ex parte decree—Condition precedent.*

The powers of revision given to the High Court by section 25, Small Cause Court Act are more extensive than those exercised by that Court under section 622, Civil Procedure Code. *Maclaren v. Welty*, A. W. N., 1907 p. 227; *Vias Ram v. Ralla Ram*, I. L. R., 21 All., 89, referred to.

The deposit of the decretal amount or the furnishing of the security is a condition precedent to the setting aside of an *ex parte* decree. Where none of these essentials has been complied with, the court is bound to dismiss the application. The defect is not cured by subsequently depositing the decretal amount. *Jagannath v. Chet Ram*, 3 A. L. J. R., 318, followed.

APPLICATION to revise an order of Babu Hari Mohan Banerji, Judge of Small Cause Court, Meerut.

Suit for money.

\* Civil Revision No. 49 of 1907.

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NANHE MAL

v.

HARJAS.

The facts material for the purposes of this report appear from the judgment.

*Girdhari Lal Agarwala* (for whom *Kedar Nath*), for the petitioner.

The opposite party was not represented.

The following judgment was delivered by

*Karamat  
Husain, J.*

KARAMAT HUSAIN, J.—Nanhe Mal instituted a suit against Harjas in the Court of the first Additional Munsif of Meerut, exercising the powers of a Judge of the Court of Small Causes. It was decreed *ex parte* by that court, on the 16th of March, 1906. On the 20th of September, 1906, Harjas put in an application, under section 108 of the Code of Civil Procedure, read with section 17(a) of the Provincial Small Cause Court Act, to set aside the *ex parte* decree passed against him, but at the time of presenting that application neither deposited the decretal amount in the court nor gave security to the satisfaction of the court, for the performance of the decree. The court, however, allowed him to deposit the decretal amount on or before the 29th of October, 1906, and the amount was deposited within the time allowed. The court, thereupon passed an order restoring the case to the file, on condition that the defendant pays Rs. 3 as penalty to the plaintiff. After restoring the case to its original number, the court, on the 4th of February, 1907, ordered the plaintiff's claim to be dismissed with costs. The plaintiff applies in revision to this court. The grounds taken in revision are that the application of the defendant, under section 108, Civil Procedure Code, read with section 17(a), ought not to have been entertained, that the order of the lower court, dated the 5th of January, 1907, upon the said application, was not legal and that the lower court had no jurisdiction to pass the decree dated the 4th of February, 1907. The powers of revision given to the High Court by section 25 of the Provincial Small Cause Court Act are more extensive than those exercised by that court, under the provision of section 622 of the Code of Civil Procedure as has been held in *Mclaren v. F. Welte* <sup>(1)</sup> and in *Vias Ram v. Ralla Ram Misir* <sup>(2)</sup>. This court, therefore, has power to revise the order passed by the

(1) [1904] A. W. N., 227.

(2) [1898] I. L. R., 21 All., 89.

first Additional Munsif of Meerut, exercising the powers of the Judge of a Court of Small Causes, ordering the case to be reheard. The learned Munsif, under the terms of section 17(a), ought to have rejected the application inasmuch as the applicant neither had deposited in court the decretal amount nor had given security to the satisfaction of the court for the performance of the decree or compliance with the judgment. In support of this proposition see *Jagannath v. Chet Ram* (\*), which lays down that "the deposit of the decretal amount or the furnishing of the security, under section 17 of the Provincial Small Cause Courts Act is a condition precedent to the entertaining of the application to set aside an *ex parte* decree. The defect is not cured by subsequently depositing the decretal amount."

The result is that I set aside the order dated the 5th January, 1907, and the decree dated the 4th February, 1907, with costs.

*Application allowed.*

(3) [1906] 3 A. L. J. R., 318.

JWALA

*versus*

GANGA PRASAD.\*

*Specific Relief Act (I of 1877), section 9—Suit for possession—Criminal proceedings—Effect of—Revision—other remedy open—not entertainable.*

Criminal proceedings, if any, taken under section 145 of the Criminal Procedure Code in no way interfere with the plaintiff's right, under section 9 of the Specific Relief Act which accrued so soon as his possession was interfered with by the defendant.

The High Court will not interfere in revision where other remedies are open to the aggrieved party. *Sheo Prasad v. Kastura Kuar*. I. L. R., 10 All., 119, referred to.

APPLICATION to revise an order of Babu Girdhari Lal, Subordinate Judge of Cawnpore.

\* Civil Revision No. 44 of 1907.

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*v.*

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*Karamat  
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*April, 11.*

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

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v.

GANGA PRASAD.

Suit for possession under section 9 of the Specific Relief Act.

The facts appear from the judgment.

*R. K. Sorabji* (with him *Parbhai Charan Chatterji*), for the petitioner.

*Mad. Ishaq Khan*, for the opposite party.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The suit, out of which this application in revision has arisen, was brought by the plaintiff, under the provisions of section 9 of the Specific Relief Act, for recovery of possession of a house, of which, he alleged, he had been forcibly dispossessed by the defendant, on the 10th of October, 1905. Section 9, of the Specific Relief Act, as amended by Act XII of 1891, provides that “if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may by suit recover possession thereof, notwithstanding any other title that may be set up in such suit,” and then follows the proviso that “nothing in this section shall bar any person from suing to establish his title to such property, and to recover possession thereof.” The Limitation Act provides that such suit may be brought within six months from the date of the dispossession. It is found by the court below that the plaintiff was in possession of the house in question up to the 10th of October, 1905, and that upon that date forcible possession was taken by the defendant. It appears that proceedings were taken under section 145 of the Code of Criminal Procedure and an investigation was made by the Magistrate for the purpose of ascertaining which of the parties was in possession at the date of the institution of the proceedings, and it is found that at the date of the order of the court, *viz.*, the 23rd of October, 1905, the defendant was in possession. The Magistrate’s duty was confined to the ascertainment of the fact of possession at this time, and beyond this and passing an order declaring the person so found to be in possession to be entitled to possession until evicted in due course of law, his duty ceased. The language of sub-section (4) of the section is that “the Magistrate shall then without reference to the merits of the claims of any of such parties to

a right to possess the subject of dispute, peruse the statements

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and if possible decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject &c."

Now it is contended on behalf of the applicant that in view of this order of the Magistrate, the plaintiff was debarred from taking advantage of the remedy provided by section 9 of the Specific Relief Act, and that his only remedy was to institute a suit in the civil court to have his title declared, and possession given to him. We are of opinion that the criminal proceedings in no way interfered with the right which the plaintiff had under the section of the Specific Relief Act, to which we have referred, so soon as his possession was interfered with by the defendant. As we have pointed out forcible possession was taken from him on the 10th of October, 1905. We therefore think that the court below rightly considered the evidence, and having come to the conclusion that the plaintiff was in possession on the 10th of October, 1905, and was forcibly ejected from such possession by the defendant, was justified in giving possession to the plaintiff. We should point out that the application in revision was not a proper remedy for the defendant under the circumstances. It has been laid down over and over again that the court will not interfere in revision where other remedies are open to a party. It was open to the defendant to institute a suit for declaration of his title and for possession, and he is not debarred from doing so by the decree passed under section 9 of the Specific Relief Act, see *Sheo Prasad Singh v. Kastura Kuar* <sup>(1)</sup>.

We dismiss the application with costs including fees in this court on the higher scale.

*Application rejected.*

(1) [1887] I. L. R., 10 All., 119.

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JWALA

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GANGA PRASAD.

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April, 6.

BURKITT, J.  
AIKMAN, J.

## SAMIN HASAN

versus

PIRAN.\*

*Code of Civil Procedure (Act IV of 1882), sections 551, 574—Provisions of section 574 not applicable to appeals dismissed under 551.*

The provisions of section 574 of the Code of Civil Procedure do not apply in their entirety to the case of an appeal dismissed under section 551 of the Code. *Rami v. Brojo*, I. L. R., 25 Cal., 97, not followed.

SECOND APPEAL against the decree of D. R. Lyle Esqr., District Judge of Moradabad, confirming a decree of Shaikh Maula Bakhsh, Subordinate Judge.

Suit to recover compensation for malicious prosecution.

The facts for the purposes of this report are so far as they are necessary fully set out in the judgment. The Subordinate Judge dismissed the suit. The plaintiff appealed to the District Judge, who fixed a date for hearing under section 551 of the Code of Civil Procedure. On the date fixed, the District Judge heard the appellant's pleader, and passed the following order:—

"It is admitted that there was and is very strong enmity between the parties and it is just as likely that the appellant had the respondent's house set on fire as that the fire was accidental. The learned Subordinate Judge was right in dismissing the suit. The appeal is summarily dismissed."

The plaintiff appealed.

*Tej Bahadur Sapru*, for the appellant.

The respondent was not represented.

The judgment of the Court was delivered by

Aikman, J.

AIKMAN, J.—The appellant brought a suit against the respondent, claiming damages for malicious prosecution. The defendant pleaded that the complaint, which he had lodged in the criminal court, was true. The court of first instance dis-

\* S. A. 336 of 1907.

missed the suit finding that the plaintiff had failed to show that the complaint was groundless. The plaintiff appealed. The learned District Judge sent for the record, and after hearing the appellant's pleader, dismissed the appeal summarily under section 551 of the Code of Civil Procedure giving brief reasons for doing so and coming to the conclusion that the learned Subordinate Judge was right in dismissing the suit. The plaintiff comes here in second appeal.

It is urged that the judgment of the lower appellate court does not comply with the requirements of section 574 of the Code. The learned advocate for the appellant relies on the decision of the Calcutta High Court, *Rami Deku v. Brojo Nath Sarkar* <sup>(1)</sup>, as an authority for holding that the provisions of section 574 of the Code apply to a judgment dismissing an appeal under section 551. With all deference to the learned Judges, who decided that case, we are not prepared to hold that the provisions of section 574 are applicable in their entirety to the case of an appeal, dismissed under section 551. We think this is evident from the immediately preceding sections in particular section 571. In the present case, it appears that the learned Judge had the record before him and heard the appellant's pleader. There is nothing to show that he did not apply his mind to the facts of the case, and the grounds taken before him. We dismiss the appeal but without costs as the respondent is not represented.

*Appeal dismissed.*

(1) [1897] I. L. R., 25 Cal., 97.

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SAMIN HASAN

v.

PIRAN.

*Aikman, J.*

CIVIL.

1908.

April, 4.

STANLEY, C. J.  
BURKITT, J.

## NARAIN PRASAD AND ANOTHER

versus

## MUNNA LAL AND ANOTHER.\*

*Pre-emption—Wajib-ul-arz—Sharik-hakiat—Malik—Owner of resumed muafi—Preference over co-sharers in other khata.*

The *wajib-ul-arz* gave a right of pre-emption to *sharik hakiat*, if any, of the *malikans* who sold their property. *Held*, that an owner of resumed *muafi* (where that was resumed before the preparation of the *wajib-ul-arz*), was a *malik* within the meaning of the *wajib-ul-arz*, if he was a co-sharer in the same *khata* with the vendor and had a preferential right over a *sharik* of a different *khata*.

APPEAL under section 10 of the Letters Patent. The judgment of the single judge is reported in 4 A. L. J. R., 665, S. C., A. W. N., 1907 p. 178.

The plaintiffs brought a suit for pre-emption on the basis of the *wajib-ul-arz*. They were co-owners with the vendor and the defendant vendees were strangers as far as the *khata* in his *pati* was concerned. The defence was that the provisions of the *wajib-ul-arz* did not apply to the resumed *muafi* holders. The Munsif and the District Judge over-ruled the contention of the defendant and decreed the claim for pre-emption, but in second appeal, a single Judge of the Hon'ble High Court dismissed the claim.

The plaintiffs appealed.

*Gulzari Lal*, for the appellants. The authorities relied on by the learned Judge apply to the muafi lands only. There is not a single case in which it was held that a proprietor of resumed muafi land is not a co-sharer.

*Mohan Lal Sandal*, for the respondent cited

*Kalian Mul v. Madon Mohan*, [1895] I. L. R., 17 All., 447.

The remarks of KNOX, J., at page 449 supported the view taken by the Judge of the Hon'ble Court. The right of pre-emption was a special right. It arose either by contract or custom evidenced by the *wajib-ul-arz*. In the present case the clause relied on occurred under the chapter headed "con-

L. P. A. No. 46 of 1907.

ditions which apply to zemindars only" and the *wajib-ul-arz* conferred a special right on the muafidars and proprietors of the resumed muafi whenever it was thought necessary. In clause 7 which related to pre-emption there was no word to suggest that muafidars and proprietors of the muafi were also included in it. In clause 8 which followed it, the framers of the *wajib-ul-arz* had expressly included muafidars and proprietors of muafi.

*Gulzari Lal* was not heard in reply.

The judgment of the Court was delivered by

STANLEY, C. J.—We have given most careful consideration to the arguments addressed to us by the learned pleaders for the respective parties and have perused the judgment of the learned District Judge and also the judgment of the learned Judge of this court. It is found that the plaintiffs are co-sharers in resumed *muafi* land, portion of which is the subject matter of the sale sought to be pre-empted. This resumed *muafi* is included in *khewat* No. 3, in which the plaintiffs are co-sharers whilst the defendant vendee Munna Lal is not a co-sharer in *khewat* No. 3 but is a co-sharer in *khewat* No. 5 with which the land in dispute is not connected, except in the fact that both *khewats* are recorded as appertaining to the same mahal. The provision of the *wajib-ul-arz* is that if from among the *malikans* any co-sharer wishes to sell his *hakiat* he will first sell the same to a co-sharer in the property (*sharik hakiat*) and in case the latter refuses to purchase then to any one he likes. The *muafi* in question was resumed before the preparation of the *wajib-ul-arz* in which this provision is found and it seems to us that the word *malikans* must be taken to include the proprietors of the resumed *muafi* and that co sharers of the land in the *khewat* in which the land sold is situate have a preferential right to pre-empt over co-sharers in land in a different *khewat* of the resumed *muafi*. The learned District Judge, who accepted the view entertained by his predecessor in office, appears to us to have correctly appreciated the position of the parties in regard to the property. The learned Judge of this court has referred to a number of cases but we find that these cases have little or no bearing upon the case before us. In fact he states in his judgment that they are distinguishable although he attaches some weight to them.

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A case which does appear to throw light upon the question is one which was not cited to him, namely, the case of *Lalta Prasad v. Lalta Prasad and others* <sup>(1)</sup>. In that case a somewhat similar question to the one before us was considered. A zamindari village contained a plot of land which at one time had been held on a *muafi* tenure, but had been resumed and had become zamindari. This plot was separately assessed to revenue, but had no separate *wajib-ul-ars*. A co-sharer in it sold his share to the defendant, a stranger, upon which the plaintiff, a co-sharer in the old *zamindari*, but not a co-sharer in the resumed *muafi*, brought a suit to enforce a right of pre-emption and it was held by STUART, C. J., and TYRRELL, J., that the lower courts were wrong in limiting the right of pre-emption to the old *zamindari* lands and in not extending it to the part of the village, which had formerly been *muafi* in its tenure. So here we think the learned Judge of this court was wrong in not extending to the owners of the resumed *muafi* the rights which were given to *malikans* generally in the *wajib-ul-ars* prepared after the resumption of the *muafi* land and the inclusion of this land in the mahal. We therefore allow the appeal. We set aside the decree of the learned Judge of this court and we restore the decree of the lower appellate court with costs in all courts.

M. L. S.

*Appeal allowed*

(1) [1881] A. W. N., 165.

## BASTI BEGAM

versus

## BANARSI PRASAD.\*

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1908

March, 26.

STANLEY, C. J.  
BURKITT, J.

*Transfer of Property Act (IV of 1882), section 53—Mortgage—Assignment of fictitious mortgage—Subsequent mortgage for consideration—No interest passes to the transferee—Rights of assignee as against mortgagor and subsequent mortgagee.*

One M made a fictitious mortgage of certain property in favour of H who transferred the mortgagee rights to his wife in lieu of dower debt. The wife obtained the transfer in good faith and for valuable consideration, but without making any enquiry as to her husband's rights. M made a mortgage of the same property to the respondent who sued to enforce it. *Held*, that the transfer of the fictitious mortgage did not pass any interest to the transferee notwithstanding that it was made *bona fide* and for valuable consideration. The *proviso* to section 53 was intended to safe-guard the rights which had already been acquired. A purchaser for value must be the purchaser of something.

*Held*, further that as M had made a fictitious mortgage in favour of H who thereby defrauded his wife, she could enforce that mortgage against M and he could not be heard to say that the mortgage was fictitious and colourable. The balance of sale proceeds, if any, after satisfying the plaintiff's mortgage and all prior charges should be applied to payment of the amount of the consideration named in the transfer made in her favour with interest *Bickerton v. Walker*, 31 Ch. D., 151, applied. *Halifax Joint Stock Banking Co., v. Gledhill*, (1891) 1 Ch. D, 31, distinguished. *Cockell v. Taylor*, 15 Beav., 103; *Ogilvie v. Jeafferson*, 2 Giff., 353; *Strode v. Blackburn*, 3 Ves., 222; *Wallwyn v. Lee*, 9 Ves., 24; *Parker v. Clarke*, 30 Beav., 54; *French v. Hope*, L. J. 56 Ch. 363; *Rice v. Riee*, [1853] 2 Drew, 73, referred to.

SECOND APPEAL from a decree of E. O. E. Leggatt Esq., District Judge of Bareilly, modifying a decree of Babu Prag Das, Subordinate Judge

One Mumtaz Ahmad, on the 23rd October, 1897, executed a simple mortgage in favour of Husain Ali Khan of certain property. Subsequently, on the 29th October, 1897, Mumtaz Ahmad executed a simple mortgage in favour of the plaintiff, Lala Banarsi Prasad, for a sum of Rs. 5,000.

\*S. A. No. 1227 of 1905.

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The plaintiff brought the present suit for sale on foot of the document of the 29th October, 1897, and alleged that the document of the 23rd October, 1897, was collusive and fictitious, and had been executed by Mumtaz Ahmad without consideration, in order to defraud his creditors. To this suit, he made a defendant, the appellant, Musammamat Basti Begam, wife of Husain Ali Khan, who had taken an assignment of the deed of the 23rd October, 1897, from her husband, in satisfaction of a claim of hers for dower. Musammamat Basti Begam pleaded that being a purchaser for value without notice of the fraud in the deed of the 23rd October, 1897, she was protected in equity as well as by the *proviso* to section 53 of the Transfer of Property Act (No. IV of 1882). The lower appellate court held that the deed of the 23rd October, 1897, was a collusive and fictitious document, and therefore although the defendant was a *bona fide* purchaser for value, she acquired nothing under her assignment, as Husain Ali Khan had nothing to transfer.

The defendant appealed.

*G. W. Dillon* (with him *Abdul Majid*), for the defendant, appellant, submitted that the defendant appellant was protected by the *proviso* to section 53 of the Transfer of Property Act (IV of 1882). That the law embodied in section 53 of the Transfer of Property Act was the same as the statute of Elizabeth. It had been held in England in

*The Halifax Joint Stock Bank v. Gledhill*, [1891], 1 Ch. 31.

that a subsequent purchaser for value without notice was protected not only against the author of the fraudulent deed but also against his representatives. He also cited

*Gour on the Transfer of Property*, Vol. I, at page 435.

He further contended that on general principles of equity, his client had a good title against the representatives of Mumtaz Ahmad. He cited as authority therefor

*Mir Mahomed Mozaffur Hossein v. Kishori* [1895], L. R., 22 I. A., 129.

a case which he submitted was exactly in point. The fact that in the case cited, the document was a fictitious and collusive sale deed, whereas in the present case, it was a fictitious and

collusive mortgage deed made no difference.

*Sundar Lal* (with him *Gulzari Lal*), submitted that it had been found that Husain Ali Khan had advanced no money, under the mortgage transferred by him to Musammat Basti Begam. The said mortgage had been found to have been a fictitious one. The transfer by him, of his supposed rights under that mortgage, did not place her in a higher position than he himself had. The *proviso* to section 53 of the Transfer of Property Act applied to a case where a person owning an interest in immovable property transferred it in good faith and for consideration to a third party. In such case, the transferee acquired a good title to the interest so transferred, though the effect of that transfer might be to defeat or delay the creditors of the transferor. The transferee acquired the full rights of the transferor whatever they were. In this case, it had been found that the transferor had no rights in the mortgage which he purported to transfer. As Husain Ali could claim nothing on account of mortgage money, Basti also could claim nothing. She was besides not a transferee in good faith in that she made no proper enquiry to ascertain what title her transferor had.

The judgment of the Court was delivered by

STANLEY, C. J.—The question raised in this appeal was strenuously and ably argued by Mr. Dillon, on behalf of the appellant, and is one of some nicety and difficulty. The plaintiff respondent Lala Banarsi Prasad instituted the suit, out of which it has arisen, to raise the amount due to him on foot of a mortgage of the 29th of October, 1897, by sale of the mortgaged property. There was a prior document of the 23rd of October, 1897, purporting to be a mortgage of portion of the property, executed by the mortgagor Mumtaz Ahmad, in favour of Husain Ali Khan, the husband of the defendant appellant, Musammat Basti Begam. The mortgage is found to have been fictitious and without consideration, and to have been made by Mumtaz Ahmad, solely for the purpose of defeating his creditors. But Husain Ali Khan transferred it to his wife Musammat Basti Begam, on the 15th of August, 1898, in satisfaction of portion of her dower debt, and it has been found on issues referred by this court for determination to the lower appellate court that this was a *bona fide* transaction, and that Musammat Basti

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Begam obtained the transfer of the mortgage, without any knowledge of its fraudulent character, and was a transferee in good faith and for consideration. This is a finding of fact which we must accept in second appeal. Dower was due to her at the time, and it was in consideration of portion of the dower so due that the transfer was made.

Both the courts below held that as the mortgage, in favour of Husain Ali Khan, was bad in law, his assignee could not derive any benefit from it. The learned District Judge in his judgment, says, "We may take it that dower was actually due to Musammat Basti Begam, and that she was a transferee in good faith, but still I do not think Musammat Basti Begam is entitled to any payment from the plaintiff. Section 53 of the Transfer of Property Act, on which apparently the appellant relies, is not, I think, applicable. I take it that the last paragraph can only apply to cases where there is some property capable of being transferred to the transferee in good faith."

The mortgage of the 23rd of October, 1897, was registered on the 29th of that month, the date of the plaintiff's mortgage, and the plaintiff had no notice of it when he obtained his mortgage. The plaintiff's mortgage was registered on the 22nd of March, 1898.

The question is whether the sham mortgage of the 23rd of October, 1897, takes priority to the plaintiff's mortgage by reason of the fact that Musammat Basti Begam took a transfer of it in good faith in satisfaction of part of her dower. Mr. Dillon, on her behalf, relied upon the last clause of section 53 of the Transfer of Property Act, which deals with transfers of immovable property, made to defeat, amongst others, the creditors of a transferor, and the last paragraph of it provides that "nothing contained in this section shall impair the rights of any transferee in good faith and for consideration." He relied upon the case of *Halifax Joint Stock Banking Company v. Gledhill* <sup>(1)</sup>, in which section 5 of 13 Eliz. Ch., 5, corresponding to section 53 of the Transfer of Property Act was considered. In that case by a settlement which was fraudulent against creditors, under 13 Eliz., Chap., 5, a reversionary life interest was reserved to the settlor, who subsequently charged his life interest by way of equitable mortgage, in favour of a

(1) [1891] 1 Ch. D., 31.

mortgagee, who advanced his money without notice that the settlement was fraudulent. It was held in a suit by the creditors to have the settlement declared void that the interest of the equitable mortgagee was protected by section 5 of the Act. In that case, the property put into settlement consisted of real estate and a policy of assurance, and these properties were conveyed and assigned to a trustee upon trust for the wife of the settlor for her life, and afterwards for the settlor for life, and subject thereto for the settlor's children. The contention in that case on behalf of the plaintiffs was that the mortgagee could have no better title than his assignor unless he could bring himself within the provisions of section 5 of the Act; that he was not a purchaser for value without notice within the protection of that section, as it related only to purchasers claiming directly under the deed, which is impeached, and not to persons who subsequently purchased an interest derived under it. KAY, J., held that section 5 includes a purchaser for value without notice of any interest under the deed impeached whether that interest be legal or equitable and prevents the deed being void as against such purchaser, and that inasmuch as the mortgagee took a deposit of the settlement from the trustee and settlor, the result was that he obtained such interest as the settlor could give him if the settlement had been valid.

It is to be observed in this case that the impeached document was a conveyance and not a mortgage, and that creditors of the settlor, and not as in the case before us a *bond fide* mortgagee, were the plaintiffs. Only one or two cases were cited to us during the argument, but we have had an opportunity since the hearing, of looking closely into authorities. In the case of *Cockell v. Taylor* <sup>(2)</sup>, the facts were these. One Collett executed a mortgage of portion of a fund in court in favour of one Preston. Preston obtained an advance from Taylor, on the security of the mortgage. The mortgage was found to be fraudulent and void as between the parties to it, but Taylor was not at all cognizant of any fraud or irregularity having been practised on the mortgage. He had no notice of anything doubtful or questionable in the transaction, creating the mortgage, and his contention was that he was entitled

(2) [1851] 15, Beav. 103.

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to hold the original mortgage security as valid to the extent of the moneys advanced by him on the security. On the other hand, it was contended that the rule of equity is that a man who purchases a *chose in action* does so, subject to all the equities which attach to it, and consequently Taylor bought the interest which was assigned to him, subject to the possibility of its being proved thereafter that somebody else had a better title to it than his assignor or that his assignor's title to it was itself worth nothing. ROMILLY, M. R., held that the sub-mortgage was void. In his judgment, he remarks: "It has not been disputed nor can it be doubted that the purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration, without notice of any prior title, but takes the thing bought, subject to all the prior claims upon it. If, therefore, the share of the plaintiff Collett in the fund in court had been charged with a sum to another person unknown to Taylor, Taylor would have taken this interest in the fund, subject to that charge. The question here raised arises from the circumstances that the prior equity is an equity in the assignor of the *chose in action*, to dispute and set aside that assignment on the ground of fraud; and it is suggested that although there be not any doubt or question as to the general rule, yet that this must be taken with some qualification when the person himself, who asserts the equity, has created the interest, under which the assignee of the *chose in action* claims it. But I have not come to that conclusion. I cannot on this ground draw any distinction between the different sorts of equities, affecting a *chose in action* or alter their priorities. Assuming as I do for the purpose of this present argument that the plaintiff Collett has a prior equity to this *chose in action*, and that the title to it of the person through whom Taylor claims is either void or subject to that of the plaintiff, the circumstance that the plaintiff has been induced to create or countenance such title, by instruments which the court holds to be void, will not in my opinion postpone or alter his original title. In saying this and in assuming that the plaintiff has this equity now subsisting, it is obvious that I must for that purpose assume that the conduct of the plaintiff has not affected this right, which is a question still remaining to be con-

dered ; but assuming that I am right in my decision that the original mortgage of December, 1848, is void as against the plaintiff, and that he has done nothing to countenance any subsequent dealing with it, I am of opinion that third persons cannot by innocently dealing with the person who improperly obtained the mortgage acquire any equity against the plaintiff." This was a mortgage of a fund ; but it seems to us that the same principle is applicable to a mortgage of land as to a mortgage of personal estate. In equity a mortgage is in fact no more than a debt, the payment of which is secured by the hypothecation of moveable or immoveable property.

In the case of *Ogilvie v. Jeafferson* <sup>(3)</sup>, the facts were these. The plaintiff James Ogilvie, who was the mortgagee of four lease-hold houses was fraudulently induced by his solicitor to execute certain deeds represented to be leases, but by which in consideration of a sum of money, never in fact paid, the plaintiff was made to assign the premises by way of sale to a female servant by whom they were afterwards mortgaged for value to the defendants. Ogilvie filed a bill to set aside these deeds, and the court held that they were wholly void, and decreed that they be delivered up to be cancelled. The defendants resisted the suit on the ground that they were purchasers for value without notice by a title, derived under the deeds, which the plaintiff had been fraudulently induced to execute. The Vice Chancellor in delivering judgment remarked that "the defendants being all aware that the plaintiff had been mortgagee, were bound to know all the particulars of his security from which the title offered to them was derived." Referring to the defence of purchase for value without notice, he referred to the case of *Strode v. Blackburn* <sup>(4)</sup>, in which Lord Rosslyn stated that such a defence was a shield to protect the possession of property, and was not available in any case except to protect the actual possession, and also to the judgment of LORD ELDON in the case of *Wallwyn v. Lee* <sup>(5)</sup>, rejecting the doctrine so propounded by Lord Rosslyn, and holding that possession by the purchaser was not necessary, provided he purchased from an apparent owner who was actually in

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(3) [1859] 2 Giff. 353. (4) [1796] 3 Ves. 222. (5) [1803] 9 Ves. 24.



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possession, and then he pointed out that the defendants could only show that they claim as purchasers for valuable consideration from Catherine Jones (the female servant), who had no possession, nor any apparent possession of anything, and who in the cause disclaimed any ownership or estate in the property which the defendants alleged she mortgaged to them and then he observes:—"On the whole case, it appears that the plaintiffs claimed to be purchaser from one who was in possession of nothing—who was apparent owner of nothing, who could convey nothing and never received anything, who was merely named as grantee in a deed, the execution of which was obtained by fraud and imposture and without any knowledge by her that she was acquiring anything or any intention or wish on her part to have or acquire any such estate or interest as the fraudulent deed affects to convey to her." This case has a close bearing on the case before us. The plaintiff in it was not indeed in so strong a position as the plaintiff here.

The ruling in the two cases lastly quoted as also that in *Parker v. Clarke* <sup>(6)</sup>, if it be good law, is decisive, we think of the appeal before us. In that case, one Cruchley conveyed all his interest under a will to secure a sum of £ 95. The mortgage was executed while Cruchley was in prison for debt and the court came to the conclusion that it was given without consideration and under a promise to release the mortgagor from prison which was never performed. Seven days after the execution of this mortgage, Thomas transferred it to the defendant Clarke who had notice of the circumstances, under which it had been obtained, and some years afterwards Clarke deposited the mortgage, and transfer with one Philips to secure the payment of moneys due and to become due to him. Philips had no notice of the circumstances, under which the mortgage had been obtained. A bill was filed against Clarke and Philips for a declaration that the mortgage deed was void; and for an order for its delivery up to be cancelled. On behalf of the plaintiff, it was contended that the deed was void and that Philips having a mere equitable title to what might be due on the mortgage could only claim such interest as Clarke was entitled to. On behalf of Philips, it was argued that he was a

(6) [1861] 30 Beav. 54.

purchaser for valuable consideration without notice and that he was entitled to hold the deed until he had been paid what was due to him ; that the mortgagor having enabled Clarke to obtain money on the faith of this deed could not set it aside without paying what had been actually advanced on it by Philips. SIR JOHN ROMILLY, M. R., held that no consideration having been given for the mortgage, as against Clarke, it must be delivered up to be cancelled, and with respect to Philips that he could only take what Clarke had given him and could not stand in a better position than Clarke himself ; that Philips must deliver up the deeds and that his only remedy would be against Clarke.

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KEKEWICH, J., dissented from this ruling in the case of *French v. Hope* <sup>(7)</sup>, the facts of which were as follows. In April, 1883, the plaintiff, in order to raise money, executed in favour of his solicitor Hope a mortgage in fee to secure £200, a receipt for that sum being endorsed but no money having been paid to the plaintiff. A few months afterwards, the mortgagee deposited the mortgage and title deeds with Messrs. Shum, Crossman & Co., to secure an advance of £ 100 to himself, Messrs. Shum, Crossman and Co., having no knowledge of the circumstances, under which the mortgage was obtained by Hope. It was held that as between the plaintiff, French, and Shum Crossman & Co., the equity of the latter must prevail and that they were entitled to rely upon their security for the £ 100, and interest. In his judgment, KEKEWICH, J., referring to the case of *Parker v. Clarke* said that he must hold that it was over-ruled by the decision of the court of appeal in *Bickerton v. Walker* <sup>(8)</sup>. The facts of that case were these :—On the 10th of February, 1879, the plaintiffs mortgaged to one Bates for £ 250, their equitable interest in a sum of stock and also certain policies of assurance and in the mortgage deed acknowledged the receipt of £ 250, and also signed a receipt for that sum, endorsed on the mortgage-deed. On the 11th of March, 1879, Bates transferred the mortgage to Hunter, who gave full value for it as a mortgage for £ 250, and had no notice that the plaintiffs had not received that sum. The plaintiffs brought their suit alleging that they had only received £ 91, and not £ 250, and asked for redemption, on

(7) [1887] L. J. R., 56 Ch. D., 363.

(8) [1885] 31 Ch. D., 151.

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payment with interest of what they had actually received. It was held that as against Hunter who had no notice that the whole £250, had not been advanced, the account must be taken on the footing of its having been advanced; for that in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment, contained in the mortgage deed, and the endorsed receipt, and had a better equity than the plaintiffs who by leaving the documents in the hands of **Bates** had enabled him to commit a fraud. **Bacon, V. C.**, held that the account was to be taken on the footing of £ 250, having been advanced to the plaintiffs. An appeal was preferred which came before **SIR JAMES HANNEN**, and **BOWEN**, and **FRY, L. J.**, and on behalf of the appellants, it was contended that a mortgage can only be enforced by a transferee to the same extent, as it might be enforced by the original mortgagee, and that a transferee takes subject to the account between the mortgagor and mortgagee. The court dismissed the appeal. **FRY, L. J.**, in delivering the judgment, observed "He (Hunter) must on the evidence before us, be taken to have advanced his money on the faith of the production of the mortgage deed, and receipt, signed by the plaintiffs, and if the assignment by the plaintiffs had been not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter, in not enquiring of the plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance because it is said, and said truly that in the ordinary course of business, a prudent assignee of a mortgage before paying his money requires either the concurrence of the mortgagor in the assignment or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however in our opinion to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor." Then he points out that in the case before them, the assignment was executed soon after

the execution of the mortgage and before the time for payment had arrived and that it was not probable that any payment would have been made either of principal or interest in the meantime and that the transferee was justified in relying upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed upon the possession of that deed by the mortgagee and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor. Now we may point out that in this case, there was a valid and binding mortgage, the only matter in dispute being the amount payable to the transferee under it; also that the competition was between the mortgagors and a transferee from the mortgagee. The court held that the conduct of the mortgagors in acknowledging in the mortgage, the receipt of the entire mortgage-debt, and giving a receipt for it, precluded them from raising the case that the entire amount of the mortgage had not been advanced. They followed the general lines laid down by KINDERSLY, V. C., in *Rice and Rice* (7), and say "for the solution of the particular question which distinguishes this case from that, *viz.*, whether there is for this purpose any difference between a mortgage and an absolute conveyance, we have not been aided by any authority cited to us at the Bar." *Parker v. Clarke* was cited in this case, but we find no reference to it in the judgment much less any adverse comment upon the ruling in it. In *Rice and Rice* the case referred to by FRY, L. J., a vendor conveyed certain property without receiving the purchase money, but a receipt for it was endorsed on the deed, and the title deeds were delivered over to the purchaser. The purchaser then made a mortgage by deposit, and absconded, and it was held as between the vendor's lien for his unpaid purchase money, and the right of the mortgagee that the possession of the title deeds, and the facts of the endorsement of the receipt on the deed gave the mortgagee the better equity. In his judgment, Kindersly, V. C., observed "upon a comparison then of the conduct of the two parties and a consideration of all the circumstances of the case and especially the fact of the possession of the deeds which the mortgagee acquired with perfect *bona fides*, and without any wrong done to the mort-

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gagors I am of opinion that the equity of the mortgagees is far better than that of the vendor, and ought to prevail." The two cases therefore lastly referred to were decided after weighing the conduct of the parties, and the equities arising therefrom. In *Bickerton v. Walker*, there was valid mortgage. In *French v. Hope*, the mortgagor was estopped by his conduct from relying on the want of consideration for the mortgage as against the sub-mortgagee. In the case before us, the defendant appellant derives her title under a sham and fictitious document, purporting to be a mortgage. At the date of the execution of the mortgage of the 29th of October, 1897, in favour of the plaintiff, she had no interest in the property and her husband also took none under the fraudulent mortgage, made in his favour. It does not appear that Musammat Basti Begam made any inquiry of the mortgagor, when she took the assignment, and previous to that date, the plaintiff had obtained his security, and this security had been duly registered. Husain Ali Khan had not at any time any interest in the mortgaged property. He had nothing to convey to his wife. The equity, if any, which sprung up in her favour when she took the transfer was against the mortgagor Muntaz Ahmad. She had no equity against the innocent mortgagee, Banarsi Prasad, whose mortgage was prior in date to the transfer in her favour. Even if *Parker v. Clarke* is to be treated as overruled, the appeal ought not, we think, to prevail. The plaintiff's equity is prior in date to that of the defendant appellant, and on the principle *qui prior est tempore potior est jure* the plaintiff has, we think, the better equity.

The transfer of the fictitious mortgage to Must. Basti Begam notwithstanding that it was made *bona fide*, and for valuable consideration did not, we think, validate the security as against the plaintiff. Basti Begam took the transfer, subject to all defects in the title of her transferrer, and cannot in equity set up the fictitious document against a *bona fide* mortgagee. The fictitious instrument received, we think, no new force against the plaintiff from the transfer. The *proviso* to section 53 of the Transfer of Property Act, which was relied on by Mr. Dillon, does not appear to us to help his client. That *proviso* was intended to safe-guard rights, which have been already acquired. A purchaser for value must be

the purchaser of something. Husain Ali Khan had no interest in the mortgaged property, under the fictitious mortgage made to him. He had nothing therefore which he could transfer to his wife, and if the latter had made inquiry of the mortgagor, she would probably have learnt that the mortgage was fictitious and colourable. On the main question, therefore, the appeal fails.

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It remains to consider whether Must. Basti Begam has any remedy against Mumtaz Ahmad. In the third ground of appeal, she claims that some relief should have been given to her as against him. This point was not specifically dealt with at the hearing. We are disposed to think upon the principle, laid down in *Bickerton v. Walker*, that if she desire to enforce the fictitious instrument as against Mumtaz Ahmad the mortgagor, she is entitled to do so. He, by his fraudulent act, placed it in the power of Husain Ali Khan to defraud his wife, and as against her, Mumtaz Ahmad cannot be heard to say that the mortgage was fictitious and colourable. We, therefore, think if there be any balance out of the proceeds of the sale of the mortgaged property, after satisfying the claim of the plaintiff, and all prior charges, such balance should be applicable to payment of the amount of the consideration, named in the transfer, made in favour of Must. Basti Begam with interest. Possibly the lower appellate court intended to give her this relief, for we find in the decree a direction that the balance of the proceeds of sale, after payment of the sum, found due to the plaintiff, should be paid to the defendant "or other persons entitled to receive the same."

We direct that the decree be accordingly modified. In other respects, we affirm the decision of the lower appellate court, and as the appellant has substantially failed in her appeal, we dismiss it, save as aforesaid, with costs including fees in this court on the higher scale.

X

*Decree modified.*

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## FULL BENCH.

KING EMPEROR

versus

TULA KHAN.\*

*Code of Criminal Procedure (Act V of 1898), section 123 (and 2), 397—  
 Detain in custody—failing to give security—Nature of imprisonment—  
 Second sentence—how to be carried into effect.*

The words "committed to prison" used in section 123 (1), Code of Criminal Procedure, 1898, are equivalent to a sentence of imprisonment, and do not merely mean committed to custody. The words, "detained in prison," in sub-section (2) have also a similar meaning. A person failing to give security for his good behaviour is liable to imprisonment and the imprisonment takes effect from the day on which the warrant of the Magistrate directing detention in prison has been executed.

T was required to furnish security to be of good behaviour or be rigorously imprisoned for three years. The order was submitted to the Sessions Judge, and T was ordered to be rigorously imprisoned, pending the order of the Sessions Judge. In the meantime T was convicted for another offence by another Magistrate. *Held*, that the former sentence should be carried out first.

Criminal reference made by W. H. Webb Esq., Sessions Judge, of Furrukhabad.

On the 14th November, 1907, one Tula Khan was, under section 110, Code of Criminal Procedure, ordered by a Magistrate 1st Class to furnish security for good behaviour for a period of three years. The Magistrate submitted the case for the order of the Court of Session and further ordered the accused to be rigorously imprisoned, pending the order of that Court. On the 27th November, 1907, Tula Khan was convicted by another Magistrate of the 1st Class of an offence under section 332, Indian Penal Code, and sentenced to two year's rigorous imprisonment, including three month's solitary confinement. The Magistrate in this case further ordered that the sentence passed by him be given effect to at once and

\* Criminal Ref. 81 of 1908.

the sentence that he was undergoing be carried out next. The Court of Session, on the 7th December, 1907, confirmed the order of the Magistrate, requiring Tula Khan to furnish security or in default to suffer rigorous imprisonment with effect from the date of the Magistrate's order. On a reference made to the Court of Session by the Superintendent of Central Jail, Naini that Court sent up the record of both the cases to the High Court, with a recommendation that portion of the order of the Magistrate, which directed that the sentence passed by him should take effect before the sentence he was undergoing, should be set aside as (1) the accused was not undergoing any legal sentence of imprisonment and (2) the Magistrate had no jurisdiction to determine the date from which the sentence, that the accused was already undergoing, was to take effect. The Magistrate under section 397, Criminal Procedure Code could only order that the sentence passed by him should take effect at the expiry of the sentence the accused was undergoing. The Court of Session further recommended that as at the time of confirming the Magistrate's order in the case under section 110, Criminal Procedure Code he was not aware of the accused being convicted under section 332 Indian Penal Code, his own order be so modified as to require Tula Khan to furnish security for three years with effect from the expiration of the sentence under section 332, Indian Penal Code, or in default to suffer imprisonment for three years.

*A. E. Ryves*, Government Advocate, for the Crown, submitted that two questions of law were to be decided in the case.

(1). What was the meaning of the words "detained in prison" in sub-section 2 of section 123, Criminal Procedure Code.

(2). If that expression was equivalent to imprisonment was it such an imprisonment as was contemplated by section 397, Criminal Procedure Code.

In section 123, Criminal Procedure Code, the words "detained in prison" occurred twice. They must have the same meaning. The words when used in sub-section 1 of that section must be equivalent to imprisonment otherwise sub-section 5 and 6 of that section would have no meaning. If

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"detained in prison" in sub-section 1 meant imprisonment, it must mean "imprisonment" also in sub-section 2. If a person was imprisoned under section 123, (2), Criminal Procedure Code, he must be said to be undergoing a sentence of imprisonment and that was all that was required to bring into operation the provision of section 397, Criminal Procedure Code.

[BANERJI, J., referred to the case in Punjab Records, 1895. Criminal Judgments p. 45].

The Punjab case was wrongly decided. Section 120 Criminal Procedure Code did not apply. It applied only as indicated in the opening words and not to the stage reached in section 123, Criminal Procedure Code. Section 397 Criminal Procedure Code spoke only of a "sentence of imprisonment." It did not say "for an offence" or "after conviction." Compare section 398 and 400 Criminal Procedure Code.

The words "detained in prison," did mean imprisonment and this was a case in which therefore, the Magistrate could make an order under section 397, Criminal Procedure Code.

The accused was not represented.

The following judgments were delivered.

*Stanley, C. J.*

STANLEY, C. J.—This case raises the question whether a person required to execute a bond with sureties for his good behaviour under section 110 of the Code of Criminal Procedure and the succeeding sections, for a period exceeding one year must, pending the orders of the Sessions Judge or High Court, as the case may be, under section 123, be regarded as a prisoner convicted of an offence and imprisoned accordingly, or be merely detained in custody as an under-trial prisoner.

Tula Khan was on the 14th of November, 1907, ordered under section 118 of the Code of Criminal Procedure to give security for his good behaviour for a period of three years, and in default of his doing so, was ordered to undergo rigorous imprisonment for that period. Later on namely on the 27th of November, 1907, he was convicted of an offence, punishable under section 332 of the Indian Penal Code, and sentenced there for to two years' rigorous imprisonment, to take effect forthwith. The order of the Magistrate of the 14th of

November 1907 was maintained by the Sessions Judge on the 7th of December, 1907.

Two questions then arise. The first is whether in the interval between the 14th of November, 1907, the date of the Magistrate's order, and the 7th of December, 1907, the date of the order of the Sessions Judge, Tula Khan was to be regarded as a prisoner, undergoing a sentence of imprisonment or merely an under-trial prisoner detained in custody. The second is whether under the circumstances, the sentence of imprisonment passed upon him for the offence, punishable under section 332 is to commence at the expiration of the imprisonment ordered by the Magistrate and maintained by the Sessions Judge.

Owing to the looseness of the language used in the sections of the Code dealing with this matter, the question is not free from difficulty. Section 123 (1) provides that if any person ordered to give security under section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall except in the case mentioned in sub-section (2) of the section, be *committed to prison*, or if he is already in prison be *detained in prison* until such period expires, or until within such period, he gives the security to the court or Magistrate who made the order requiring it. Sub-section (2) provides that when such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security issue a warrant directing him to be *detained in prison*, pending the orders of the Sessions Judge or High Court, as the case may be. Then sub-section (3) provides that the court, that is, the Sessions Judge or High Court, as the case may be, after examining the proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary shall pass such orders in the case, as it thinks fit.

I have no doubt that the words "committed to prison" in sub-section (1) are equivalent to a sentence of imprisonment, and do not merely mean 'committed to custody'. In the succeeding portion of the section, the words "if he is already in prison" give an indication of the meaning of the words

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"committed to prison." They imply that the party is undergoing imprisonment and the succeeding words "be detained in prison" seem necessarily to mean that the imprisonment which the party is already undergoing shall be continued. This meaning derives support from sub-section (6) which provides that imprisonment for failure to give security for good behaviour may be rigorous or simple. This sub-section gives us an insight into the mind of the legislature and indicates that imprisonment was the meaning attributed by it to the words "committed to prison" or "detained in prison." In section 3 (3) of Act No. IX of 1894 (The Prisons Act) which gives a definition of convicted criminal prisoners, we find that a person ordered to give security for good behaviour under the bad livelihood sections of the Code is included in the term. This is an Act *in pari materia* and may be looked to in determining the language of the sections with which we are dealing.

Then we come to sub-section (2) in which fall the words which we are called upon to interpret. It provides for the case in which a person has been ordered by the Magistrate to give security for a period exceeding one year and directs the Magistrate if such person does not give the security to "issue a warrant directing him to be *detained in prison*, pending the orders of the Sessions Judge." Are the words "detained in prison" equivalent to imprisonment or do they merely mean 'detained in custody' as an under-trial prisoner? As used in sub-section (1) they must, as I have attempted to show, be regarded as equivalent to imprisonment and there seems to be no good reason why they should not have a similar meaning in this sub-section. It would be contrary to the principles of interpretation to assign a different meaning to the same words when used in an Act of the Legislature and particularly so when they occur as here in the same section. In view then of the language of the section I think that the Legislature intended that a person failing to give security for his good behaviour should be liable to imprisonment, either simple or rigorous, and that in a case to which sub-section (2) applies such imprisonment should have effect, pending the order of the Sessions Judge, from the date on which the warrant of the Magistrate, directing detention in prison, has been executed.

I now come to the second question, that is whether Tula Khan was undergoing a sentence of imprisonment within the meaning of section 397 of the Code, when the sentence was passed upon him for the offence punishable under section 332. In other words, whether the last mentioned sentence is to be treated as commencing at the expiration of the imprisonment ordered by the Sessions Judge. It seems to me to follow as a corollary to the answer which I would give to the first question that section 397 is applicable. The order of the Sessions Judge cannot be regarded otherwise than as amounting to a sentence of imprisonment if the words "committed to prison" or "detained in prison" mean imprisonment. I would therefore answer this question in the affirmative.

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KNOX, J.—I have had the advantage of reading and considering the judgment of the learned Chief Justice. I need say no more than that I concur.

Knox, J.

BANERJI, J.—Two questions arise in this case :—

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(1) when a person has been ordered by a Magistrate to give security for his good behaviour for a period exceeding one year and that person does not give such security is the Magistrate competent to issue a warrant for his imprisonment, simple or rigorous? and

(2) is an order of imprisonment for failure to give security for good behaviour a sentence within the meaning of section 397 of the Code of Criminal Procedure?

As regards the first question it is obvious that the Magistrate has no authority, in a case to which sub-section (2) of section 123 of the Code of Criminal Procedure applies to order the person who has failed to give security to be imprisoned for three years or any other specific period. He is only competent under that sub-section to issue a warrant directing such person "to be detained in prison," pending the orders of the Sessions Judge or the High Court, as the case may be. The order of the Magistrate in this case directing Tula Khan to be rigorously imprisoned for three years, is therefore clearly illegal. The question is whether the Magistrate was competent to order Tula Khan to be kept in simple or rigorous imprisonment, pending the

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orders of the Sessions Judge or whether he could only direct Tula Khan to be detained in custody as an under-trial prisoner pending such orders. The answer to this question depends on the meaning to be attributed to the words "detained in prison" in that sub-section. Do those words mean imprisonment or simply detention in custody? The matter is not free from difficulty and I must confess that I was at first inclined to hold that the legislature intended the detention to be detention in custody only, as the Magistrate is not the authority which has to make the final order for imprisonment in the case and, that order must emanate from the court of the Sessions Judge. No doubt could have arisen in the matter had the legislature employed the same language in sub-section (2) as it has used in sub-section (1) and had sub-section (2) provided that the Magistrate shall issue a warrant directing the person who has failed to give security to be "committed to prison, or if he is already in prison, to be detained in prison" pending the orders of the Sessions Judge.

However, we have the fact that the same words, namely, "detained in prison" are used in both the sub-sections. There can be no doubt that in sub-section (1) those words mean imprisonment, which may, under sub-section (6), be either rigorous or simple. When the legislature uses the same words in another clause of the same section, we must presume that it does so in the same sense and therefore "detention in prison" in sub-section (2) must be held to mean imprisonment as in the first sub-section. This construction may in some instances result in hardship, for instance, where a person ordered by the Magistrate to furnish security for good behaviour for a period of three years is found by the Sessions Judge to be a person who should not have been ordered to give security, he will have suffered imprisonment before the final order in the case was made. This, however, may happen in many cases of conviction by a subordinate court. That the legislature intended the words "detained in prison" to mean imprisonment and not mere detention in custody also appears from the fact that in section 107 it uses the words "detention in custody" and this conclusion finds some support from the definition of a "convicted criminal prisoner" in the Prisons Act (No. IX of 1894). I must therefore hold that when a person ordered by

a Magistrate to give security for good behaviour for a period exceeding one year does not give such security, the Magistrate is not competent to order such person to be imprisoned for the period for which he has been ordered to give security but should issue a warrant directing him to be detained in simple or rigorous imprisonment, as the Magistrate may determine, pending the orders of the Sessions Judge or the High Court, as the case may be. I may observe that this question was neither raised nor decided in *Queen Empress v. Jafar* <sup>(1)</sup> and *King Empior v. Jawahir* <sup>(2)</sup> which are the only cases bearing on the point to which our attention was invited.

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Upon the second question, namely, whether an order of imprisonment in default of giving security for good behaviour is a sentence within the meaning of section 397, I entertain some doubts. A sentence of imprisonment ordinarily implies punishment for an offence committed and therefore imprisonment for failure to furnish security can not be regarded as a sentence in the ordinary sense of that word. There is much force in the reasoning by which the judgment of the Punjab Chief Court in the case of *Diwan Chand* <sup>(3)</sup> is supported. It seems, however, that the legislature used the word 'sentence' in section 397 in a wide sense. If it were held that the word does not include imprisonment in default of furnishing security, a person undergoing such imprisonment may practically escape punishment for an offence of which he may be subsequently convicted. Section 120 of the Code of Criminal Procedure can not apply to such a case and surely it could never have been intended that he should go unpunished. I would therefore answer the second question in the affirmative.

AIKMAN, J. A Magistrate of the first class ordered one Tula Khan to give security for his good behaviour for a period exceeding one year. The security not having been given, the Magistrate under the provisions of section 123 (2), Code of Criminal Procedure, forwarded the case to the Sessions Judge for orders.

*Aikman, J.*

In the earlier part of his order, the Magistrate directed that in default of furnishing security, Tula Khan should undergo

(1) [1899], A. W. N., 151.

(2) [1903] A. W. N., 28.

(3) 30 Punjab Rec. Cr. Jt. No. 14.

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rigorous imprisonment for 3 years. This part of the Magistrate's order was clearly wrong. At the conclusion of his order, however, he directs that pending the orders of the Sessions Judge, the accused should undergo imprisonment.

The Magistrate's order was passed on the 14th November, 1907.

On the 7th December, 1907, the learned Sessions Judge being satisfied "that the accused is a habitual thief and extortioner and that he is so desperate and dangerous as to render his living at large hazardous to the community" directed that, in the event of his failing to furnish the security required, he be rigorously imprisoned for the term of three years with effect from the date of the Magistrate's order.

In the interval between the date of the Magistrate's order, and the date of the Sessions Judge's order, Tula Khan was convicted on the 27th November, 1907, by another Magistrate of an offence punishable under section 332 of the Indian Penal Code, and was sentenced to two years' rigorous imprisonment. The Magistrate directed that this sentence should take effect at once, and that the accused should subsequently undergo the imprisonment consequent on his failure to furnish security. No appeal, we are informed, has been preferred by the accused against this conviction and sentence.

The learned Sessions Judge has submitted the case to this Court with the recommendations first, that that portion of the order of the Magistrate, dated 14th November, 1907, which directs Tula Khan to be rigorously imprisoned for three years in default of furnishing security should be set aside, and that the order of the Magistrate, dated 27th November, 1907, in regard to the execution of the sentence under section 332 Indian Penal Code should also be set aside, and 3rd that his own order of the 7th December, 1907, directing the period of imprisonment in default of furnishing security to run from the 14th November, 1907, should be modified, and that it should be directed that the period for which Tula Khan is to furnish security, and the imprisonment in default should run from the expiration of the sentence under section 332, Indian Penal Code.

With regard to the first recommendation, I think, it is only necessary to point out the mistake the Magistrate made in his order of 14th November, 1907, as the order of the Sessions Judge dated the 7th December, 1907, is now the operative order.

The second and third recommendations of the learned Judge raise a more difficult question. The answer to it depends upon the answer to the question whether Tula Khan, when he was sentenced to imprisonment under section 332, Indian Penal Code was "a person already undergoing a sentence of imprisonment" within the meaning of section 397 of the Code of Criminal Procedure, so as to render the provisions of that section applicable.

I think this question must be answered in the affirmative. Section 123 (2) of the Code of Criminal Procedure directs that when a person ordered by a Magistrate to give security for a period exceeding one year fails to give the security required, the Magistrate shall "issue a warrant directing him to be detained in prison, pending the orders of the Sessions Judge" I think it cannot be denied that a person detained in prison under such a warrant is during the period of his detention undergoing "imprisonment for failure to give security."

The provisions of sub-sections, (5) and (6) contain directions as to the nature of the imprisonment in such a case and clearly indicate that a person 'detained in prison' under sub-section (2) is in a very different position from a person awaiting his trial for an offence. The warrant issued in the latter case is a warrant committing him "to custody" *vide* section 220, Code of Criminal Procedure.

The Prisons' Act, 1894, draws a distinction between a 'convicted criminal prisoner' and an 'unconvicted criminal prisoner' and section 3 (3) of that Act declares that the expression "convicted criminal prisoner" includes a person detained in prison under Chapter VIII of the Code of Criminal Procedure, the chapter in which section 123 occurs.

I think it is clear from the language both of the Code of Criminal Procedure and of the Prisons Act, 1894, that the Legislature considers that a person who is ordered to be 'detained in prison' for failure to give security occupies a very

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different position from a person who is under trial. I hold that a Magistrate who, under section 123 (2), orders a person who has failed to furnish security for his good behaviour to be detained in prison, pending the orders of the Sessions Judge, thereby sentences the person to imprisonment, which under sub-section (6) may be rigorous or simple as the Magistrate directs. The proviso to section 123 (3) enacts that the period for which any person is imprisoned for failure to give security shall not exceed three years. In the present case, the learned Sessions Judge, therefore, very properly ordered that the period of three years for which Tula Khan was to be imprisoned in the event of his failing to furnish security was to have effect, not from the date of his own order, but from the date of the Magistrate's order.

I hold then that when Tula Khan was sentenced for the offence under section 332, Indian Penal Code, he was a person "already undergoing a sentence of imprisonment" within the meaning of section 397, Code of Criminal Procedure. It will be noted that in section 397 the words "for any offence" which we find in section 399 after the word 'imprisonment' do not occur. If they did, it would be impossible to hold that section 397 applies to the present case. For the reasons given above, I hold that section 397, Code of Criminal Procedure applies to this case.

I cannot therefore accept the learned Judge's second and third recommendations. I would allow the order of the learned Sessions Judge dated 7th December, 1907, to stand, but would modify the order of the Magistrate dated 27th November, 1907, by setting aside so much of it as directed that the sentence under section 332, Indian Penal Code should take effect forthwith, and in lieu thereof direct that that sentence shall commence at the expiration of the imprisonment adjudged to him owing to his failure to furnish security for his good behaviour.

Cf. Form XIV, Sch. V, Code of Criminal Procedure.

*Richards, J.*

RICHARDS, J.—The first question which arises is the meaning of the expression "detained in prison" in section 123, sub-section 2 of the Code of Criminal Procedure. In other words should a Magistrate after he has ordered a person to give securi-

ty under section 106 or section 118 and after that person has failed to give security, issue a warrant directing the person to be kept in rigorous or simple imprisonment, pending the orders of the Sessions Judge or should the warrant simply direct that, that person should be kept in custody? The argument in favour of the latter construction is that the position of the person named in the warrant is analogous to the position of an "under-trial" prisoner; that the Magistrate has no power to order the person to be imprisoned because the final order must be made by the Sessions Judge who may possibly discharge the accused altogether.

Clause 1 provides that on failure to give security in the case of a person ordered to give such security for a period not exceeding one year, the Magistrate shall commit the person to prison or if the person is already in prison shall detain him in prison.

Clause 5 provides that imprisonment for failure to give security for keeping the peace shall be simple.

Clause 6 provides that imprisonment for failure to give security for good behaviour may be rigorous or simple.

Section 3 (3) of Act IX of 1894 includes in the definition of "convicted criminal prisoner" any person *detained* in prison under the provisions of Chapter 8 of the Code of Criminal Procedure.

Reading clauses 1, 5 and 6 of section 123 together, it is perfectly clear that a person, who has been ordered to give security by a Magistrate for a period not exceeding one year and who has failed to give such security, must be imprisoned with either simple or rigorous imprisonment.

Had clause 2 after the words "warrant directing him" read "to be committed to prison or to be detained in prison" that is to say had the same mode of expression been adopted in clause 2 as in clause 1, there would be no difficulty. The change of expression no doubt creates some ambiguity. I however think that if the expression "detained in prison" in clause 1, means detained in simple or rigorous imprisonment the same expression in clause 2, must have the same meaning. This view is strengthened by the definition of "convicted criminal prisoner," to which I have already referred and also

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by a comparison with clauses 3 and 4 of section 107 where the expressions "detaining such person in custody" and "detain such person in custody" are used. I do not think that the argument based on the supposed analogy of a person ordered to give security for a period exceeding one year with an under-trial prisoner is sound. A particular class of Magistrate is prescribed by the Code for holding the enquiry which must be held before an order under section 123 is passed: it is such a Magistrate who must always adjudicate whether or not the person is a person from whom security ought to be demanded. If security is only to be demanded for one year the Magistrate makes a complete order. It is only when the Magistrate has ordered the person to give security for a period exceeding one year and the person has failed to give such security that the proceedings are to be laid before the Sessions Judge. If the legislature has given power to the Magistrate to send a person to rigorous or simple imprisonment whom he has found to be a person from whom security should be demanded for one year, I can see no reason why he should not have power to send a person to like imprisonment whom he has found to be a worse and more dangerous character. The imprisonment should of course be only as provided by the section, that is, pending the orders of the Sessions Judge.

On the second question I agree with the judgment of the learned Chief Justice.

By the Court. The order of the Court is that the order of M. Abdul Jalil, dated 14th November, 1907, in so far as it directs Tula Khan to be rigorously imprisoned for three years be set aside, that the said order be altered into one directing the detention of Tula Khan in rigorous imprisonment, pending the orders of the Sessions Judge, that the order of the Sessions Judge, dated 7th December, 1907, be affirmed, and that the order of M. Mata Badal, dated 27th November 1907, be modified to this extent that the sentence passed by him on Tula Khan under section 332 of the Indian Penal Code do take effect from the date of the expiration of Tula Khan's imprisonment for failure to give security for his good behaviour.

B. N. G.

*Order altered.*

## MUNAWAR HUSAIN AND OTHERS

*versus*

## KHADIM ALI AND OTHERS.\*

*Pre-emption—refusal to purchase—before sale settled with a stranger—  
effect of*

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1908.

March, 11.

STANLEY, C. J.  
BURKITT, J.

In order to defeat the plaintiff's right of pre-emption, it must be shown that an offer to purchase was made to him when the price had been fixed between the vendor and the vendee and that was brought to his knowledge. The mere fact, that the plaintiff refused to purchase before the price was settled between the vendor and vendee, does not debar him from claiming his right of pre-emption. *Kanhia Lal v. Kalka Prasad*, I. L. R., 27 All., 670; *Sohan Lal v. Shahabuddin*, S. A. 909 of 1901, followed.

FIRST APPEAL against the decree of Shaikh Maula Bakhsh, Subordinate Judge of Moradabad.

Suit for pre-emption.

The material facts appear from the judgment.

*Abdul Raoof* (with him *Ishaq Khan*), for the appellants.

*B. E. O'Connor* (with him *Gokul Prasad*), for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—This appeal arises out of a suit for pre-emption. The learned Subordinate Judge found that the plaintiffs refused to accept the purchase which had been made by the vendee Syed Khadim Ali, and on this ground dismissed the plaintiffs' suit. The evidence upon which the Subordinate Judge found that the plaintiffs refused to make the purchase has been read to us, and it appears from it that all that the plaintiffs did was to state that they would not buy the property. The property was not offered to them at any definite price. They are said to have assigned as a reason for their refusal to purchase that they were not in funds to do so and that it was alleged that the property was *waqf*. In the case of *Kanhia Lal v. Kalka Prasad* (1), which was also an appeal in a pre-emption suit, this Bench, following the ruling in the

Stanley, C. J.

(1) [1905] I. L. R., 27 All., 670.

\* F. A. 52 of 1902.

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unreported case of *Sohan Lal v. Shahab-ud-din Khan* <sup>(2)</sup> held that in order to debar a party entitled to pre-empt a sale from exercising his right, an opportunity must be given to him to purchase when a definite agreement to purchase at a fixed price has been entered into with a stranger, and that it is not enough to offer the property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party. In view of these decisions, the learned Subordinate Judge was wrong, in our opinion, in holding that the plaintiffs refused to make the purchase. The offer to purchase ought to have been made to the plaintiffs when the price had been fixed between the vendor and vendee, and that price brought to the knowledge of the plaintiffs. In the court below the plaintiffs alleged that the real price agreed to be paid by the defendant was only Rs. 13,000, whereas the vendee alleged that the price was Rs. 17,500. One of the grounds of appeal in this Court is that the price paid by the defendants is only Rs. 13,000. The plaintiffs appellants now admit that Rs. 17,500 was the price, and express their willingness to pay that amount. Under the circumstances, therefore, we must allow the appeal. We set aside the decree of the court below, and we give a decree in favour of the plaintiffs for pre-emption on payment of a sum of Rs. 17,500, and direct that upon payment of that amount within six months from this date, the plaintiffs be put in possession of the pre-empted property. On failure to pay that amount within the period aforesaid, the suit of the plaintiffs will stand dismissed with costs in both courts. If the plaintiffs make the payment within the period aforesaid, the order which we pass as to costs, in view of the attitude adopted by the plaintiffs and the fact that they insisted to the last upon their allegation that the price was Rs. 13,000 only, is that both parties abide their own costs both of the appeal and in the court below.

*Appeal decreed.*

(2) Second Appeal No. 909 of 1901.

BABU LAL  
versus  
GHANSHAM DAS.\*

CRIMINAL.

1908.

March, 16.

KNOX, J.

*Criminal Procedure Code (Act V of 1898), sections 179, 185—Hundis issued from Hathras—fraudulently cashed at Calcutta—Jurisdiction of Aligarh Court—Penal Code (Act XIV of 1860), section 415.*

G purchased certain *hundis* at Hathras and sent them to B at Calcutta. B became an insolvent but cashed the *hundis*. G filed a complaint against B at Aligarh, charging him with cheating inasmuch as he had realised the money from the drawees at Calcutta after becoming insolvent: *Held*, that the court at Aligarh had no jurisdiction to try the case which should be tried at Calcutta. The words "and of any consequence which has ensued" in section 179 of the Code of Criminal Procedure embrace only such consequences as modify or complete the act alleged to be an offence. A Magistrate when he acts upon a complaint is confined to the four corners of the complaint.

The act or omission causing damage within the meaning of section 415 of the Penal Code is the act in the case of the person who handed over the proceeds of these *hundis* and damage or harm is the damage or harm to that person. *Q. E. v. O'Brien*, I. L. R., 19 All., 111, distinguished.

Application to revise an order of A. Freemantle, Esq., Magistrate of the first class of Aligarh.

The material facts and arguments appear from the judgment. *C. Dillon*, (with him *Sir Walter Colvin*, and *Gulzar Lal*), for the petitioner.

*G. P. Boys*, for the opposite party.

The following judgment was delivered by

KNOX, J.—Ghansham Das laid a complaint before the Magistrate at Aligarh and asked that warrant might issue for the arrest of Babu Lal. In the complaint there is a heading which is to the effect that Ghansham Das was instituting a charge, under section 420 and 422 of the Indian Penal Code. The facts, constituting the charge so alleged, are thus set out in the examination of the complainant, on the 27th of May, 1907. The accused realised moneys, due under two *hundis*, Ghansham

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\* Cr. Revision 78 of 1908.

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*Knox, J.*

Das had purchased and had sent to Babu Lal's shop at Calcutta. He became an insolvent on the 25th of May. He realised the moneys on the 27th of May. And the complainant continues :—"Had the drawees of these *hundis* known the fact of his being an insolvent, the amount would never have been realised. The amount was realised as this fact was concealed from them." It is evident both from the complaint and the examination that the offence aimed at by Ghansham Das, the offence into which he wished the Magistrate to hold an inquiry, was the dishonest and fraudulent realisation of the moneys due under the *hundis*, which took place in Calcutta.

The question whether the Magistrate of Aligarh had jurisdiction was at once challenged. The Magistrate, however, overruled the plea as to want of jurisdiction, and Babu Lal has come to this Court with an application, under section 185 of the Code of Criminal Procedure.

I have heard the learned counsel both on behalf of Babu Lal and Ghansham Das.

The learned counsel for Ghansham Das takes his stand upon section 179 of the Code of Criminal Procedure and the ruling of this Court in *Queen Empress v. O'Brien*<sup>(1)</sup>. There was another argument addressed to me, and that was that this application is premature. Whatever the complainant may have stated in his complaint and in his examination, the court before which he went, if satisfied that a swindle had been committed in which Ghansham Das was the sufferer, was fully empowered to inquire into that dispute, whatever may have been said in the complaint and the examination.

This argument, however, loses sight of the fact, equally important, that before a summons or warrant can issue the court must have before it definite evidence of facts which constitute, if proved, a complaint of an offence within that court's jurisdiction. A Magistrate may, if he sees fit, take action over and above what is stated in the complaint, and, so to speak, in spite of it. But that is the case of a Magistrate, who acts upon his own knowledge and suspicion. When he acts upon a complaint, he is confined within the four corners of the complaint. It is contended that section 179, by reason

(1) [1896] I. L. R., 19 All., 111.

of the words contained in it "and of any consequence which has ensued," gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are intended to embrace only such consequences as modify or complete the acts alleged to be an offence.

Looking again to section 415 of the Indian Penal Code, which defines cheating, the act or omission causing or likely to cause damage or harm is the act in the case of the person, who handed over the proceeds of those *hundis*, and the damage and harm must be the damage or harm to those very persons and not any damage or harm to Ghansham Das.

It has been no part of the argument that the drawees of the hundis in Calcutta who cashed them in Calcutta, were in any way harmed. Ghansham Das has not based his complaint upon any acts done to him at Hathras, but his learned counsel very strenuously tried to import those acts into the complaint as the acts which constituted the acts of cheating, I do not say what would have been my order if the complaint had rested upon those act or acts. This case of *O'Brien* is in my opinion no guide, under the present circumstances. *O'Brien* was an agent in possession or supposed to be in possession of goods and moneys belonging to a firm at Cawnpore, and it was not known where the actual offence of the breach of trust by him was committed.

In the case before me definite acts are complained of and their locale is set out, and if they constitute any offence, it is cognizable in Calcutta. I accordingly decide that this act be tried by a Court of competent jurisdiction at Calcutta.

*Application allowed.*

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1908.

March, 10.

STANLEY, C. J.  
BURKITT, J.

## AMIR BEGAM

*versus*

## BANK OF UPPER INDIA LD., MEERUT.\*

*Code of Civil Procedure (Act XIV of 1887), sections 293, 306—25 per cent  
not paid immediately on sale, effect of.*

When a purchaser of property at a court sale fails to deposit the 25 per cent of the purchase money, immediately after the sale, it is not only irregular but it is no sale at all, and the decree-holder is not justified in claiming the difference of price between the first and second sales. *Intizam Ali v. Narain Singh*, I. L. R., 5 All., 316, followed.

FIRST APPEAL against the decree of Maulvi Muhammad Shafi, Subordinate Judge of Aligarh.

Suit for a declaration of right.

The material facts appear from the judgment.

The court below dismissed the suit.

Plaintiff appealed.

*Abdul Majid*, for the appellant.

*B. E. O'Connor*, for the respondent.

The judgment of the Court was delivered by

Stanley, C. J.

STANLEY, C. J.—The facts of this case are these. The Bank of Upper India held a decree for sale on the property of Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan. In execution of that decree, they attached and advertised for sale the property of their judgment-debtors. The plaintiff, Musammat Amir Begam, who is the wife of Afzal Shah, authorized one Hajdar Shah to purchase for her out of the property so advertised for sale, as she alleges, the share which belonged to her husband, but not the shares of Dost Muhammad Khan and Amir Muhammad Khan in the village of Purwana Mahmudpur. The share of Afzal Shah in this village was sold, on the 20th of August, 1903, to the plaintiff, and the deposit in respect of the purchase money was duly made, and this sale was carried out. With this share, we have nothing to do in this appeal. The shares

\* F. A. 29 of 1906.

of the other judgment-debtors in this village were put up for sale on the 23rd of August, 1903, and were knocked down for a sum of Rs. 20,000. Haidar Shah attended at this sale and was the highest bidder. He represented that he attended and bid at the sale on behalf of the plaintiff. No deposit on account of the purchase money was made. Time was allowed to Haidar Shah to pay the deposit, but he failed to do so, and on the 25th of August, 1903, this share of the property was sold for a sum of Rs. 12,500 to the decree-holders, the Bank of Upper India. The Bank then claimed to be entitled to recover from Musammat Amir Begam, the amount of the difference in the sale price of the property, and the price offered by Haidar Shah, namely, Rs. 7,500. Musammat Amir Begam objected, alleging that Haidar Shah had no authority from her to purchase the property in her name. The Bank then attached her property in execution, for the purpose of raising the amount of their claim, and she thereupon instituted the present suit to have it declared that she was not liable to pay the deficiency, and that the defendant Bank was not entitled to recover that deficiency from her, and that her property could not be sold to satisfy the amount.

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*Stanley, C. J.*

The court below held upon the issue as to whether or not Musammat Amir Begam did give authority to Haidar Shah to bid on her behalf, in respect of this share of the property, that she had given such authority and dismissed her suit. Hence the appeal which is now before us.

[His Lordship after consideration of the evidence proceeded as follows :—]

Upon the whole we are clearly of opinion that Haidar Shah had no authority whatsoever from Musammat Amir Begam to purchase the shares of Dost Muhammad Khan and Amir Muhammad Khan, and this being so, the plaintiff's suit ought to have been decreed.

There is a further matter which has occurred to us on the hearing of the appeal, and that is this. Under the provisions of section 306 of the Code of Civil Procedure, a purchaser is required to deposit 25 per cent of the amount of his purchase money immediately after he has been declared the purchaser. The section provides that in default of such deposit the pro-

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perty shall be forthwith put up again and sold. It was decided by a Bench of this Court in the case of *Intizam Ali v. Narain Singh* (1), that if a purchaser failed to make the deposit required by this section, no sale whatever could be held to have taken place. STUART, C. J., in that case held that the sale impugned by the appeal was not bad by reason of an irregularity in its conduct but that "it was no sale at all, inasmuch as the indispensable conditions of the law, as contained in section 306 of the Code of Civil Procedure, were not fulfilled by the person declared to be the purchaser. The sale took place early in the afternoon of 20th April 1882, and the respondent did not pay a deposit of 25 per cent on the amount of his purchase immediately after the declaration that he was the purchaser." Then they say :—"In default of such deposit the property should have been forthwith put up again and sold. The order of the court below confirming the sale was therefore wrong and must be set aside." This is an authority which we are bound to follow. It decides that there was in this case no sale, and therefore no resale such as would justify the claim of the Bank made under section 293. There was in fact no resale within the meaning of that section. Therefore upon the merits as well as in view of the provisions of section 306, it appears to us that the plaintiff ought to have succeeded in her suit.

We therefore allow the appeal. We set aside the decree of the court below and give a decree to the plaintiff in the terms of the relief asked for in the plaint. The defendant Bank must pay the costs of this appeal and also the costs in the court below.

(1). [1883] I. L. R., 5 All., 316.

*Appeal decreed.*

## HIMMAT BAHADUR AND ANOTHER

*versus*

## BHAWANI KUNWAR AND OTHERS.\*

CIVIL.

1908.

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

*Hindu Law—Husband's debts—satisfied by a wife in his life-time—Voluntary payment—Transfer of husband's property after his death. Equity—liability to pay the consideration money—Joint family, nature of.*

The existence of debts due by the ancestor at the time of his death is a condition precedent to the liability of the heir to pay them. When a husband's debts were paid by a wife in the life-time of the husband, the payments were voluntary payments and the husband's property could not be made liable for those debts after his death. A transfer of property for payment of those debts could not be deemed to be a transfer made for payment of his debts.

During the life-time of *N*, his wife *M* paid his debts. After his death when she inherited his property she transferred certain property to satisfy those debts. Plaintiffs, the daughter's sons of *N*, sued to set aside that sale. *Held*, that the plaintiffs were not bound, by the sale as the payments by *M* were only voluntary, and the property could not be made liable for the debts, but the plaintiffs were in equity liable to pay the whole consideration money which the transferee had paid.

Nature and incidents of a joint Hindu family governed by the Mitakshara considered.

FIRST APPEAL against the decree of Babu Madho Das Subordinate Judge of Shahjehanpur.

Suit for possession of property.

The facts are fully given in the judgment of KARAMAT HUSAIN, J. Shortly they are as follows :—Mulo Kunwar, the grand-mother (mother's mother) of the plaintiffs paid certain debts due from her husband in his life-time. After his death, she inherited his property, and in order to discharge those debts, she transferred a portion of it to one Jiwan Sahai who transferred it to Bhawani Kunwar and who in her turn mortgaged it to him. The plaintiffs, daughter's sons of Mulo Kunwar and sons of a grandson of Jiwan Sahai, brought the present suit for possession on the ground that the transfer by

\* F.A. 243 of 1905.

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v.

BHAWANI  
KUNWAR.

Mulo Kunwar was not for necessity. The court below dismissed the claim.

Plaintiffs appealed.

*G. W. Dillon* (with him *Sundarlal* and *Motilal Nehru*), for the appellants, submitted that the payments made by Mulo Kunwar were made in the life-time of her husband. They were therefore voluntary payments and consequently the transfer made by Mulo was not for a valid necessity and was not binding on the plaintiffs. It was further submitted that the plaintiffs were entitled to one-eighth as members of joint family of which Jiwan Sahai was the head, and if they were liable at all, they were only liable to the extent of the eighth of the consideration money.

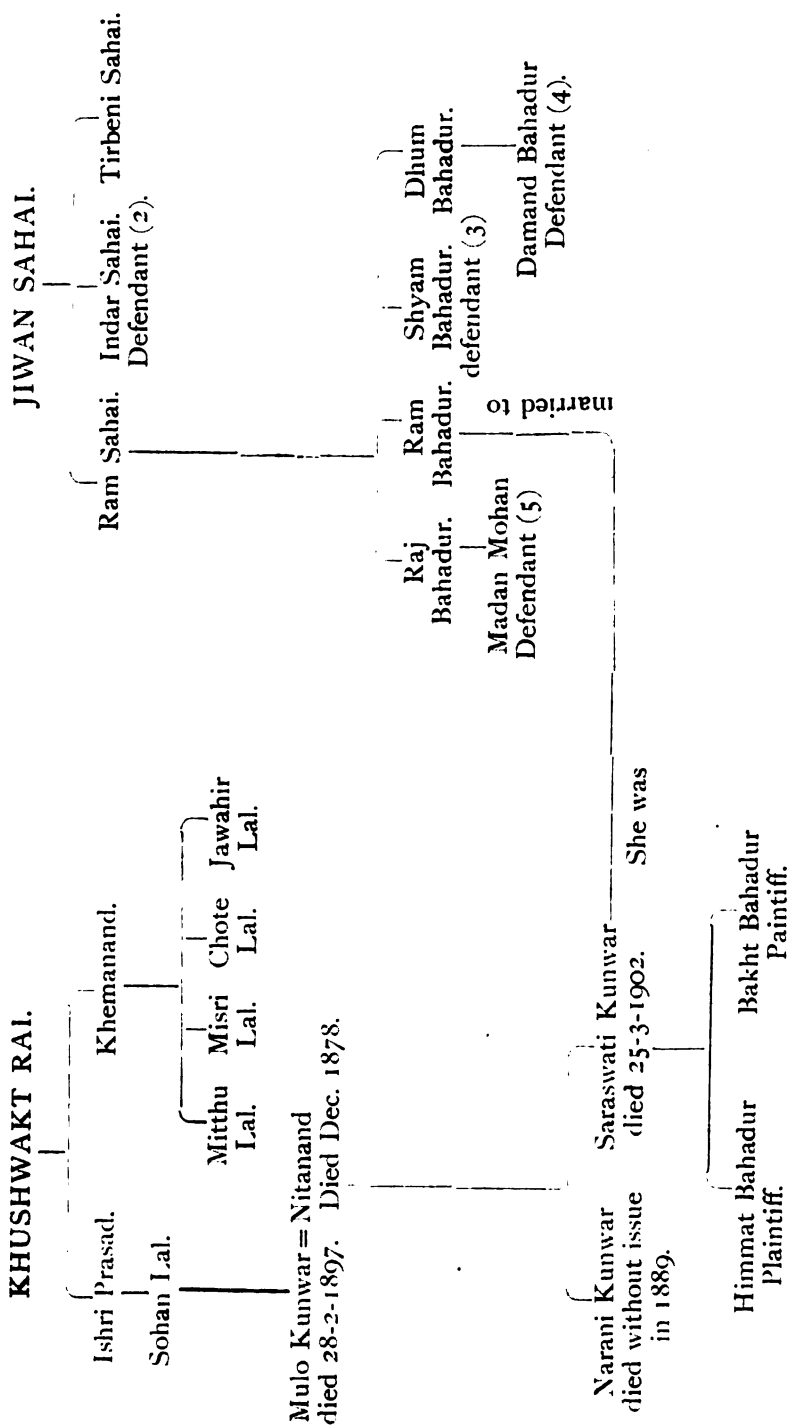
*Abdul Moyid* (with him *Sir Walter Colvin* and *B. E. O'Connor*), for the respondents submitted that the debts incurred by Nitinand were duly paid by his wife, Mulo Kunwar. There was no evidence that she paid the money as a mere gratuitous payment and that she had no intention to get it back from her husband. Such being the case when Mulo Kunwar had to return the money to her creditors, she had power to transfer the estate of her husband, and that amounted to legal necessity according to Hindu Law. Further, the plaintiffs along with Jiwan Sahai and others formed members of a Joint Hindu family. The money paid by the defendant, having come into the joint funds, plaintiffs and other members of the family benefited by it. They were liable to pay the whole consideration money before they could get the property. In a joint family, no member of such family could say what his share in the property was. He cited.

*Hasmat Rai v. Sundar Das*, [1885] I. L. R., 11 Cal., 396.

The following judgments were delivered.

*Karamat  
Husain, J.*

KARAMAT HUSAIN, J.—Before stating the facts of the case I set forth the following pedigree. It will show the relation of the parties to the suit, with the exception of Musammam Bhawani Kunwar who is a transferee of Jiwan Sahai under the sale deed of the 9th February 1892. The suit was instituted on the 14th December 1904.



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KUNWAR.

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*Karamat  
Husain, J.*

The facts which have led up to this appeal are as follows :—

One Malik Muhammad Ali Khan obtained two decrees against Ishri Parshad and his brother Khemanand. One was dated the 17th August, 1822, for Rs. 23,348-3-0 and the other was dated the 20th August, 1822, for Rs. 17,800. These decrees were put in execution from time to time and a sum larger than that which was actually due was realised under them. A suit then was instituted for the ascertainment of the excess and the High Court in 1896 fixed it at Rs. 41,600. Soon after the amount of the excess had been fixed the heirs of Ishri Parshad and Khemanand started proceedings to recover it from the property of Husaini Begam a daughter of Malik Muhammad Ali Khan. The village Parewa belonging to her was attached and sold on the 20th September, 1877. One Nur Ahmad purchased it for Rs. 52,000. Babu Ram Sarup who had purchased the rights and interests of two of the four sons of Khemanand realised on the 27th and 28th November, 1877, Rs. 49,107 out of the sale proceeds of Parewa, and deposited the same with Jadon Rai and Baldeo Parshad. Out of the sum so deposited Musammat Mulo Kunwar withdrew sums amounting to Rs. 21,475 by instalments. Out of the money so received she applied Rs. 17,612 to the payment of the debts due by her husband Nitinand in his life time.

The sale of Parewa in a suit brought by one Altaf Ali Khan was set aside on the 30th January, 1878, and on the sale being set aside Nur Ahmad on the 12th December, 1878, applied for the return of his purchase-money and his application was granted on the 20th December, 1878. He proceeded against the property which Musammat Mulo had inherited from her father and her husband. She sued Nur Ahmad for a declaration that she was not liable to refund the entire sum realised by Ram Sarup. The High Court on the 25th November, 1878, held that she as an heir of Ishri Parshad was liable to pay the entire amount. Nur Ahmad realised portions of his claim and a balance of Rs. 21,815-6-6 remained due to him. This is the balance for which according to the allegations in paragraph 15 of the plaint the heirs of Khemanand alone were liable. Jiwan Sahai paid this balance at the instance of Musammat Mulo Kunwar to Aziz Ahmad and

Zamir Ahmad sons of Nur Ahmad for the discharge of the money due to their father. The money was paid out of the proceeds of the sale of the property which was sold by Jiwan Sahai to the sons of Nur Ahmad on the 4th of May, 1885.

In order to pay the debt due to Jiwan Sahai Musammat Mulo Kunwar sold to him, on the 30th September, 1890, for Rs. 17,665 the property in suit which she had inherited from her husband. As Musammat Saraswati mother of the plaintiffs was recorded in the revenue papers as owner of the property in dispute she also joined her mother in selling the property to Jiwan Sahai. On the 9th February, 1892, Jiwan Sahai and Banke Bihari Lal a co-sharer in the village, sold the entire 20 biswas of the village Yusufpur and 13 biswas 6 biswansis 6 kachwansis and 15 nanwasis in the village of Deora Shaikhpur to Bhawani Kunwar for Rs. 30,000. The property sold included the property in dispute and the share of Jiwan Sahai in the sale proceeds was Rs. 17,400. Besides selling the property in dispute to Bhawani Kunwar, Jiwan Sahai executed an agreement on the 9th February, 1892, in which he covenanted that in the event of the plaintiffs recovering the property from her she would be entitled to recover the price paid by her from certain immoveable property of his which was specified in the agreement.

As Bhawani Kunwar could not pay the whole price of the property so purchased by her she hypothecated it in favour of Jiwan Sahai by way of security under a deed of the 11th February, 1892. She from time to time paid portions of the mortgage debt with interest. After the death of Jiwan Sahai she deposited the balance of the mortgage debt *i.e.*, a sum of Rs. 5,466-10-3 in Court for payment to the representatives of Jiwan Sahai.

Indar Sahai and others applied on the 27th July, 1899, for payment to them of the money so deposited but their application was refused. On the 19th March, 1902, another application for payment was made by them but it was also unsuccessful. The case of the plaintiffs with reference to the facts stated above is that they are the heirs of their maternal grand-father Nitinand; that the sale of the property left by Nitinand was made by Mulo Kunwar without legal

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necessity and was therefore void as against them and that they are entitled to a decree for proprietary possession thereof. They also allege that for the payment of Rs. 21,815-6-6 the heirs of Khemanand alone were liable. Bhawani Kunwar in her defence pleaded that the heirs of Jiwan Sahai were necessary parties to the suit, that the suit was barred by limitation, that the plaintiffs were estopped from questioning the sale carried out by Jiwan Sahai, that the debts due by Nitinand were paid out of the sale proceeds of Parewa and that it was the duty of Mulo Kunwar and Saraswati to sell the property of Nitinand to discharge his debts; that the sale of the 30th September 1890 is binding upon the plaintiffs; that the plaintiffs and Jiwan Sahai were members of a Joint Hindu family and as such were benefited to the extent of the funds realized by the sale effected by Jiwan Sahai and that the plaintiffs are therefore bound by that sale.

The learned Subordinate Judge framed the following issues :—

1. Is the plaintiffs' suit barred by limitation ?
2. Is the suit barred by section 115 of the Indian Evidence Act ?
3. Was the estate of Khemanand alone liable for the sum of Rs. 21,815-6-6 paid by Musammat Mulo Kunwar through Jiwan Sahai for the discharge of Nur Ahmad's decree or was Ishri Parshad's estate also liable for it ?
4. Were any debts of Nitinand, and if any, of what amount, repaid out of the money forming the consideration for the sale-deed of 30th September 1890 executed by Mulo Kunwar in favour of Jiwan Sahai, and what effect has this fact on the alienation of Nitinand's property which is the subject matter of the suit ? What are the plaintiffs' liabilities under the deed ?
5. Are the plaintiffs bound by the transfer made by Jiwan Sahai to Bhawani Kunwar because he was their (great) grandfather ?
6. Were Jiwan Sahai and the plaintiffs members of an undivided Hindu family, and what effect has this fact on the suit ?

7. Is Indar Sahai a necessary party to the suit. Did Jiwan Sahai transfer the property to Bhawani Kunwar in good faith?

Regarding the 7th issue the learned Subordinate Judge says "Indar Sahai has subsequently been made a party to the suit. He denies his connection with the suit and correctness of the plaintiffs' claim." His finding on the first issue was that the suit was not barred by limitation inasmuch as the alienation sought to be set aside had been made during the minority of the plaintiffs and as the suit was instituted within three years of their attaining majority. On the second issue he found that the plaintiffs were not estopped as they were not parties to the applications of the 27th July, 1899, and the 19th March, 1902, relied on by the defendant. On the 3rd issue he found that under the decree of the High Court dated the 25th November, 1884, the estate of Ishri Parshad was liable for Rs. 21,815-6-6. On the 4th issue he came to the conclusion that although the debts due by Nitinand were paid off by Mulo Kunwar from her share in the sale proceeds of Parewa yet the plaintiffs were bound by the sale. The learned Subordinate Judge, on the findings already stated, dismissed the plaintiffs' claim without trying issues 5 and 6. The plaintiffs then preferred this appeal to this Court. The grounds urged in appeal are to the effect that the voluntary payments made by Mulo Kunwar in the life-time of her husband towards the discharge of debts due by him did not entitle her after his death to transfer his property and that the plaintiffs are not bound by the sale effected by her. It was also urged on the plaintiffs' behalf that they were entitled in any event to a decree for the recovery of the property in suit on payment of such sum of money as the court should consider them liable to pay.

The appeal came on for hearing on the 11th December, 1907 and the following three issues were referred by this Court under section 566 of the Code of Civil Procedure for trial to the court below :—

1. At the date of the sale to Musammat Bhawani Kunwar and the receipt of the purchase money were the plaintiffs and Jiwan Sahai members of a joint Hindu family?

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2. If the family was not joint at that time, or had ceased to be joint since that time, to what share of the joint estate did the plaintiffs become entitled on separation?

3. Did the plaintiffs receive any, and if so, what benefit from the purchase made by Musammat Bhawani Kunwar from Jiwan Sahai?

On the first issue the learned Subordinate Judge found that the plaintiffs and Jiwan Sahai were joint on the date of the sale to Bhawani Kunwar and the receipt of the purchase money. No objection has been taken to this finding. His finding on the second issue was that according to the plaintiffs, separation took place in 1894 among all the members of the family while according to the defendant Indar Sahai alone separated in 1897 and that plaintiffs became entitled to  $\frac{1}{8}$  share in the joint estate on separation. On the 3rd issue the learned Subordinate Judge found that the plaintiffs were to be presumed to be benefited to the extent of  $\frac{1}{8}$  of the sale consideration of Rs. 17,400, *i.e.*, Rs. 2,175. Objections were taken to the above findings to the effect that as the price was received while the family was joint it was not correct to say that the plaintiffs were benefited to the extent of one-eighth of the price only.

At the hearing of the appeal on the return of the findings two points were urged on behalf of the appellants. First it was urged that as the payments which were made by Mulo Kunwar were made in the life-time of her husband they could not come within the meaning of the term "debt" for the discharge of which his widow could lawfully sell the property she had inherited from him. Secondly it was contended that as the plaintiffs on separation were benefited to the extent of  $\frac{1}{8}$ th of the price they were entitled to recover the property in dispute on the payment of Rs. 2,175. The first contention in my opinion is well founded. The obligation to pay the debt of a person whose estate is taken by another person rests, as Mr. Mayne puts it, "upon the broad equity that he who takes the benefit should take the burthen also." [Mayne on Hindu Law section 327 p. 423, seventh Ed.] The existence of debts due by the ancestor at the time of his death is therefore a condition precedent to the liability of the heir to pay them. If there

are no debts due by the deceased his heir has no burthen to take. In the case before us certain debts incurred by Nitand were no doubt paid off by his wife but they were paid in his life-time. In the absence of any evidence to prove the contrary those payments must be presumed to have been voluntary payments and the presumption gains much strength from the relationship of husband and wife in which the parties stood to each other. Such being the case the property which Mulo Kunwar inherited from her husband Nitand could not be made liable for the debts which had no existence at his death and the transfer of such property by her could not be deemed to be a transfer made for the payment of his debts. The plaintiffs therefore could not be bound by the sale deed executed by Mulo Kunwar on the 30th September, 1890.

For the decision of the second point *i.e.*, the right of the plaintiffs to recover the property in dispute on payment of Rs. 2,175, it is to be borne in mind that Bhawani Kunwar is in possession of that property; that Jiwan who presumably was the manager of the joint Hindu family sold it for the benefit of the family with an undertaking to make good any loss which Bhawani Kunwar might sustain if she were dispossessed of it in a suit by the plaintiffs; that the plaintiffs were joint with Jiwan Sahai at the time of the sale and the receipt of the purchase money, and that this purchase money was brought into the common purse of the joint Hindu family for the benefit of the family. In addition to the above facts two traits of a joint Hindu family governed by the Mitakshara are also to be borne in mind. They are the *unity of juristic existence* in dealings with third persons and the *unity of the ownership* of the joint property by the members of the joint family. That these traits are to be found in such a joint family will appear from the following remarks. "The term joint in the expression joint Hindu family has been borrowed from the language of English property law" (K. K. Bhattacharyya Joint Hindu Family, page 51 Ed., of 1885). It is not only the term joint which has been borrowed from the English law, but several incidents of joint tenancy have also been imported into the law governing a joint Hindu family. "As soon as it was observed that there was a very tangible analogy between Hindu co-parceners and English joint tenants it was

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inevitable that incidents of English joint tenancy should have been extended to the legal position of the Hindu co-parceners, at least in cases where such extension did not run counter to anything to be found in the original texts. We must remember that the Judges who did this had no other course left open to them; for they were familiar with the law of English Joint Tenancy; they saw nothing in the original texts, or in the translations, to guide them in the particular instances: certainly the most reasonable course for them was, avowedly or not, to take advantage of that other law they were familiar with, supported as this course was with the analogy already adverted to" (K. K. Bhattacharyya, *Joint Hindu Family*, pp. 54, 55, Ed. of 1885). Out of the incidents of the joint tenancy which have been introduced into the law of the joint Hindu family I am here concerned with two. The first is that all the joint tenants as regards strangers are deemed for juristic purposes as one *single individual*. "A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves the properties of one single owner" (Williams on Real Property, page 133, 19th Ed.). "Being regarded with respect to other persons as but one individual their estate will necessarily continue as long as the longer liver of them exits," (Williams on Real Property, page 133, 18th Ed.). "Joint tenancy, as its name bespeaks, is essentially a joint interest. Whatever may be their rights as between themselves as regards strangers all the holders of an estate in joint tenancy are regarded but as a single individual. It results from this principle, that, so long as there remains any participant of the joint ownership so long does the estate continue and therefore, in case of the death of one or more it will survive to the remainder" (Goodeve, *Real Property*, 239, 2nd Ed.). "The joint tenants are as regards third persons considered to be one single owner" (Shephard and Brown on T. P. Act. 145, 6th Ed.). This *unity of juristic* existence finds its place in the law of the joint Hindu family as appears from the following passage:—"This old law laid down by the original texts prohibiting the members from reciprocally bearing testimony, or becoming sureties or giving or accepting presents seems to be founded upon the principle that all the members together constitute a single entity in the eye

of law." (K. K. Bhattacharyya Joint Hindu Family, 203, Ed. of 1885). Sir V. Bhashyam Ayyangar in *Sundrasanamam v. Narasimulu*<sup>(1)</sup> remarks:—"But so long as a family remains an undivided unit two or more members thereof whether they be members of different branches or of one and the same branch of the family can have no legal existence as a separate independent unit, but if they comprise all the members of a branch they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such". The second trait *i.e.*, the *unity of the ownership* of the joint property by the members of a joint Hindu family under the Mitakshara has been explained by their Lordships of the Privy Council in *Appovier v. Rama Subbaiyan* <sup>(2)</sup> as follows:—"According to the true notion of an undivided family in Hindu Law no individual member of that family, whilst it remains undivided can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rents, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of the undivided property must be brought according to the theory of an undivided family to the common chest or purse, and then dealt with according to the mode of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares then the character of an undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim a right to receive and enjoy in severalty although the property itself has not been actually severed and divided".

Now I have to consider certain consequences of the two unities already mentioned. A corollary of the unity of ownership is that the plaintiffs can not be deemed to have been benefited to the extent of  $\frac{1}{8}$  of the sale consideration. The fact that at a subsequent separation they got one-eighth of the joint pro-

(1) [1908] I. L. R. 25 Mad., 149 at 155.

(2) 11 M. L. A., 75.

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perty can not be a measure of the benefit received by them at a former time when they were joint. The above corollary settles the question of the quantum of the liability of the plaintiffs, for if their benefit in the sale consideration is not a determinate share their liability cannot be for a proportionate share of it. This leads me to consider whether they are or are not liable to refund the sale consideration at all. Having regard to a corollary of the unity of juristic existence in dealings with third persons all the members who formed this joint Hindu family at the receipt of the price of the property sold to Bhawani Kunwar are jointly liable for the whole of it. If the sale in her favour is set aside she is entitled to a refund of the whole price paid by her and she can recover it from one of the members who constituted the joint Hindu family at the time of its receipt as well as from the entire group. The plaintiffs as heirs of Nitinand are entitled to have the sale of his property to Jiwan Sahai set aside ; but as members of a joint Hindu family, for the common benefit of which the whole consideration of the sale by Jiwan Sahai was brought into the common purse of the family, are liable to refund the whole of it to Bhawani Kunwar. They cannot say that on a subsequent partition they got  $\frac{1}{8}$  of the family property only and therefore have a right to recover the property on payment of  $\frac{1}{8}$  of the purchase money. That share was their right on partition with reference to the other members of the joint family, but the liability as regards Bhawani Kunwar is a single liability to return the whole of the purchase money paid by her. The case of *Hasmat Rai v. Sundar Das*, (1) though not on all fours with the present case favours the view taken by me. According to that case if the sale to Bhawani Kunwar were set aside the whole of the purchase money would be a debt of Jiwan Sahai and unless his sons showed that it had been contracted for immoral purposes mentioned in the Hindu *Shastras* the whole of the joint family property would be liable for it and the sons could not recover the whole or any portion of the property sold without refunding the whole of the purchase money. For the above reasons I hold that the plaintiffs are entitled to recover the property in dispute from Bhawani Kunwar on the payment

(1) [1885] I. L. R., 11 Cal., p. 396.

of Rs. 17,400. I would therefore allow the appeal set aside the decree of the court below and give the plaintiffs a decree for possession of the property in suit provided that they deposit into court for payment to Musst. Bhawani Kunwar defendant No. 1 a sum of Rs. 17,400 (seventeen thousand and four hundred) on or before the 1st November, 1908. If they fail to deposit the said sum of Rs. 17,400 their suit shall stand dismissed with costs in both courts including fees in this Court on the higher scale. The plaintiffs will be entitled to mesne profits from the date of deposit into court to the date of delivery of actual possession to them of the property in suit.

STANLEY, C. J., I agree with my learned colleague in the conclusion at which he has arrived. The questions involved in the appeal present some difficulty particularly the question whether the plaintiffs appellants could be put under terms to pay the amount of the purchase money paid by Musammat Bhawani Kunwar to Jiwan Sahai or any part of that sum as a condition precedent to the recovery of the property claimed. It appears to me however, in agreement with my learned brother, that we cannot say that the benefit of the payment made to Jiwan Sahai, who was the head of the joint family of which the plaintiffs were members at the time, can be now sub-divided so as to enable us to say that the plaintiffs only partially enjoyed the benefit. Under all the circumstances I think that if the plaintiffs are to recover the property, they are in equity bound to pay the amount of the moneys received by the head of their family when it was joint, that is, the sum of Rs. 17,400. It may be that the plaintiffs if they paid this amount will be entitled to recover contribution from the other members of the family. This question however is not before us. I concur in the order proposed.

BY THE COURT.—The appeal is allowed, the decree of the court below set aside and a decree for possession of the property in dispute given to the plaintiffs, provided that they deposit in court for payment to Musammat Bhawani Kunwar, the defendant No. 1, a sum of Rs. 17,400 on or before the 1st of November, 1908. On payment by the plaintiffs of the aforesaid sum, they will be entitled to the

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osts of this appeal and also the costs in the court below including fees in this Court on the higher scale, and also the mesne profits from the date of the deposit up to the date of delivery of actual possession. If they fail to make the deposit their suit will stand dismissed with costs in both courts including fees in this Court on the higher scale.

X.

*Appeal decreed.*

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March 11

April 30.

May, 13.

STANLEY, C. J.  
BANERJI, J.  
AIKMAN, J.

## FULL BENCH.

SULTAN BEGAM AND OTHERS

*versus*

DEBI PRASAD.\*

*Partition Act (IV of 1893), section 4—"undivided family", meaning of—whether applicable to Mahomedans.*

Mahomedans are not excluded from the benefit of section 4 of the Partition Act (IV of 1893). The object of that section explained.

*Perhsad v. Bankey Lal*, 9 Oudh cases 158 followed, *Hashmat Ali v. Muhammad Umar*, I. L. R., 29 All., 308, overruled.

APPEAL against the decree of Babu Prag Das, Subordinate Judge of Cawnpore.

Suit for partition.

The facts appear from the following order of reference to the Full Bench which was made by STANLEY, C. J. and BURKITT, J.—The only question now remaining for determination in this appeal is one as to the true construction of section 4 of the Partition Act, IV of 1893. The suit is one for partition of property situate in Cawnpore, which consists of an enclosed area on which stands an Imambara and also a dwelling-house known as Mahal Sarai. The property, it is said, formerly belonged to members of the family of the Nawab Wazir of Oudh. The shares of three members of the family were purchased at three auction sales by a Hindu gentleman, the plaintiff in the suit, who now seeks to have the property partitioned. The defendant Nawab Sultan

F. A. No. 92 of 1906.

Begam in her written statement offers, if the court think that the suit is not barred by limitation and that the plaintiff is entitled to have the property partitioned, to pay to the plaintiff under provisions of section 4 of the Partition Act, the value of the share of the property to which he is entitled. On the part of the respondent it is contended that section 4 has no application to Muhammadans, but only to an undivided Hindu family or a family governed by the Hindu law of succession, and relies upon the words in this section "undivided family" as establishing this. Apparently he asks us to introduce the word "Hindu" before the word "family." In the case of *Hasmat Ali v. Muhammad Umar*,<sup>(1)</sup> this question came before a Bench of this Court, but the respondents were not represented before the Court. The Court with regret held that section 4 did not apply, except in the case of an undivided Hindu family, and that a Muhammadan could not obtain the benefit of that section. We have serious misgivings as to the correctness of this decision. In a case which came before the Judicial Commissioner of Oudh and is reported in 9 Oudh Cases, 156, the Acting Judicial Commissioner held that the words 'undivided family' must be so interpreted as to include every family, whether it be a Hindu family or otherwise, and one which is undivided *quod* the particular dwelling house, and the words 'dwelling house' must be interpreted to mean not only the house in which the members of an undivided family actually live, but also a house which belongs to the family and in which other members of that family have a right to live if they feel so inclined to do." In view of the importance of the question we think that the issue should be referred to a larger Bench for determination, namely, whether or not Muhammadans are excluded from the benefit of section 4 of the Partition Act. We refer the matter to the Chief Justice for the appointment of a larger Bench.

The question referred was then argued before a Bench of three Judges. The arguments and cases cited appear from the judgments.

*B. E. O'Connor* (with him *Abdul Raoof* and *Girdhari Lal*), for the appellants.

*Sunderlal*, (with him *Moti Lal Nehru*), for the respondents.

(1). [1907] I. L. R., 29 All., 308.

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April, 30.

Stanley, C. J.

The following judgments were delivered.

STANLEY, C. J.—The question which has been referred to us for determination in this case is whether or not Muhammadans are excluded from the benefit of section 4 of the Partition Act, No. IV of 1893. This section prescribes that where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder. It is contended on the one hand that the words "undivided family" as used in this section mean a joint family and are confined to Hindus or to Muhammadans who have adopted the Hindu rule as to joint family property. On the other hand the contention is that the expression is of general application and means a family, whether Hindu, Muhammadan, Christian, *et cetera*, possessed of a dwelling-house which has not been divided or partitioned among the members of the family. The Act purports to be a general Act extending to the whole of British India, and admittedly sections 2 and 3 apply to Muhammadans as well as to Hindus. Section 2 enables the Court in a suit for partition, in a case in which a division of property cannot reasonably or conveniently be made and in which a sale and distribution of the proceeds would be more beneficial for all the share-holders, on the request of share-holders interested individually or collectively to the extent of a moiety or upwards, to direct a sale of the property. The succeeding section empowers the Court, in a case coming within the previous section, if any share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, to order a valuation of the share or shares and to offer the same to such share-holder at the price so ascertained. Then follows the fourth section, and in it we find nothing to indicate that it was intended to apply to any limited class of the community. The words "undivided family" as used in this section appear to be borrowed from section 44 of the Transfer of Property Act. The last clause of that section prescribes that where the transferee of a share

*of a dwelling-house belonging to an undivided family* is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling-house. This provision of the statute is clearly of general application, and the effect of it is to compel the transferee of a share of a dwelling-house belonging to an undivided family, who is a stranger to the family, to enforce his rights in regard to such share by partition. There appears to me to be no reason why the words "undivided family" as used in section 4 of the Partition Act, should have a narrower meaning than they have in section 44 of the Transfer of Property Act. If the Legislature intended that section 4 should have limited operation, we should expect to find some indication of this in the language of the section. For example, instead of the words "undivided family" the expression "undivided Hindu family" or "joint family" might have been used.

The question came before a Bench of this Court in the case of *Hashmat Ali v. Muhammad Umar* <sup>(1)</sup> which was a second appeal. The respondent to it was not represented. Our brothers Knox and Richards in that case held on the analogy of the Full Bench ruling in *Amme Raham v. Zia Ahmad* <sup>(2)</sup> that section 4 did not apply to a Muhammadan family, but they did so with some regret.

In *Amme Raham v. Zia Ahmad* <sup>(2)</sup> it was held that the words "joint family property" in Art. 127 of Schedule II of the Limitation Act mean the property of a joint family. In that case the word "joint" which has a settled and well defined meaning is used, and it is in no sense ambiguous. It could not be used as descriptive of property held in common. I fail to discover that there is any analogy between the two cases.

It seems to me that the object of the section, as was pointed out by Mr. Wells, Judicial Commissioner, in the case of *Kalku Pershad v. Bankey Lal* <sup>(3)</sup> is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling-house in which other members of his transferor's family have a right to live, and that the words "undivided

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(1) [1907] I. L. R., 29 All., 308.

(2) [1890] I. L. R., 13 All., 282.

(3) 9 Oudh Cases., 158

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family" must be taken to mean "undivided *quâ* the dwelling-house in question and to be a family which owns the house but has not divided it." It has been pointed out to us that the Partition Act has been extended to Upper Burma under the Upper Burma Laws Act, No. XIII of 1895. No part of the Act merely but the whole Act has been so extended. If section 4 was intended by the Legislature to apply to Hindus only or persons who have adopted the Hindu rule of joint family property, it is unlikely that it would have so extended section 4 in view of the fact that there are very few Hindus in Upper Burma.

For these reasons I would reply to the question referred to us that Muhammadans are not excluded from the benefit of the section in question.

*Banerji, J.*

BANERJI, J.—I agree and have nothing to add.

*Aikman, J.*

AIKMAN, J.—I also concur in the judgment of the learned Chief Justice.

BY THE COURT.—The answer of the Court is that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, No. IV of 1893.

The case coming on before STANLEY, C. J., and BANERJI, J., the following judgment was delivered by

*May 13.*  
*Banerji, J.*

BANERJI, J.—All the pleas taken in the memorandum of appeal in this case were abandoned and the only contention pressed on behalf of the appellants was that section 4 of the Partition Act applied. The Full Bench has now held that, that section applies to Mahomedans and therefore it was applicable in the present case. The result is that we allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it under its original number in the register, and carry out the provisions of section 4 of the Partition Act. Having regard to the circumstances of the case, we direct that the plaintiff, respondent will have half his costs of this appeal including fees on the higher scale.

*Appeal allowed.*

JANKI DAS  
*versus*  
KING EMPEROR.\*

*Code of Criminal Procedure Act (V of 1908), section 556—Excise officer ordering prosecution—trial by him as magistrate.*

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KNOX J.

Section 556 of the Code of Criminal Procedure does not preclude a magistrate from trying a case under section 52 of the Excise Act in which the prosecution was ordered by him as an Excise officer.

Reference by H. Dupernex Esq., Sessions Judge of Saharanpur, with a recommendation that an order passed by M. A. G. P. Pullan Esqr., Magistrate 1st class of Saharanpur be set aside.

The material facts appear from the judgment.

The parties were not represented.

The following judgment was delivered by

KNOX, J.—Janki Das, a licensee of a liquor shop for the retail sale of liquor at Sheikhipur, was ordered by the Excise Officer to change the site of his shop. He disobeyed the order, was tried by the Excise Officer, who was also a Magistrate of the District, and under section 52 of Act No. XII of 1896 was convicted and fined for disobedience of the order. The learned Sessions Judge of Saharanpur has referred the case to this Court with a recommendation that the trial and fine should be set aside on the ground that section 556 of the Code of Criminal Procedure precluded the Excise Officer from trying the case. The learned Magistrate defends his position and points out that the precedent *In re Ganeshi* <sup>(1)</sup> which was a Full Bench decision of this Court, supports his action. So far the learned Magistrate is undoubtedly right. Since that decision, however, was given the Code of 1898 was enacted, and the terms of section 556 were considerably amplified. Further, an illustration was attached to that section which might at first sight seem to be intended by the Legislature as setting aside the decision arrived at by the Full Bench in 1892. But upon closer exa-

Knox, J.

(1) [1893] I. L. R., 15 All., 192.

\* Criminal Reference No. 107 of 1908.

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*Knox, J.*

mination it will be found that the illustration attached to section 556 is the case of a Collector directing the prosecution of an offender for a breach of the excise laws; according to the illustration such Collector is disqualified from trying such a case. The Collector and the Excise Officer in a district are two different persons, and it is a sound rule of law that no illustration should be pushed further than its words warrant. I have carefully examined the words of section 556 of the new Code to see whether the amplifying words introduced into it at all affect the pronouncement of this Court in 1892. I cannot find that they in any way affect it. I therefore see no reason to interfere and direct that the record be returned.

*Record returned.*

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*April, 24.*STANLEY, C. J.,  
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HUSAIN, J.

NANNHI JAN

*versus*

BHURI AND ANOTHER.\*

*Code of Civil Procedure (Act XIV of 1882), section 263—suit under—burden of proof.*

When an objection preferred under section 278 of the Code of Civil Procedure is disallowed and the objector institutes a suit, he is bound to lay some evidence to satisfy the court that the document under which he claims represents a *bonâ fide* and genuine transaction and the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. *Tulshi Rai v. Ram Das*, A.W.N., 1887 p. 71; *Afsal Begam v. Muhammad Obaidat-ullah* A. W. N., 1899 p. 220, *Ramnath v. Bindraban*, I. L. R., 18 All., 369; *Govind Atmaram v. Santai*, I. L. R., 12 Bom., 270; *Suba Bibi v. Balgobind*, I. L. R., 8 All., 178, referred to.

SECOND APPEAL against the decree of Louis Stuart, Esq., District Judge of Meerut, reversing a decree of H. David Esq., Subordinate Judge.

Suit for a declaration of right.

The material facts appear from the judgment.

*J. N. Chaudri* (with him *Ghulam Mujtaba*), for the appellant.

\* S. A. 557 of 1907.

*Muhammad Ishaq*, for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.,—This appeal arises under the following circumstances. The defendant Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan, on the 4th of August, 1905, instituted a suit against her husband, for the recovery of her dower, and on the 24th of November, 1905, obtained a decree. On the 2nd of August, 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first court dismissed the suit, but upon appeal the learned District Judge reversed the decision of the court below and decreed the plaintiff's claim.

The main question which has been discussed before us is whether or not the learned District Judge rightly laid the burden of proof on the defendant Musammat Nannhi Jan. According to his judgment he found, in agreement with the court below, that the oral evidence was valueless, and held that the decision of the case turned on the amount of value to be placed upon the deed of sale in favour of Musammat Bhuri. Then he says: "The burden of proof was upon the defendant respondent Musammat Nannhi Jan to prove that the deed had been executed fictitiously and collusively. She did absolutely nothing to satisfy this burden." And later on he observes:—"Musammat Nannhi Jan having absolutely failed to discharge the burden of proof on her to show that the sale deed was executed fraudulently, fictitiously and collusively. I find that the deed of sale in question is a genuine document"? It is contended that the learned District Judge regarded the case from an entirely wrong standpoint and that the trial of the case was wholly unsatisfactory. The important fact to

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bear in mind is that Musammat Bhuri filed an objection to the attachment and to the sale of the property which had been transferred to her and that her objection had been disallowed. In consequence of this it was necessary for her to institute the suit. It appears to us to be well settled, so far at all events as this court is concerned that a plaintiff coming into court under such circumstances is bound to lay before the court some evidence to satisfy the court that the document under which she claims represents a *bonâ fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. The learned District Judge appears to us to have laid the burden of proof upon the wrong party. In the case of *Tulshi Rai v. Ram Das* <sup>(1)</sup> Straight and Tyrrell, JJ., held that under similar circumstances the burden rested upon the plaintiffs who were impeaching the disallowance of their objection filed in the execution department to establish by clear and satisfactory proof that the property attached was their property at the date of the attachment and not the property of the judgment-debtor. This decision was followed in *Afzal Begam v. Muhammad Obaidat-ullah Khan* <sup>(2)</sup> and also in the case of *Ram Nath v. Bindra Ban* <sup>(3)</sup>. It also has the support of the case of *Govind Atmaram v. Santai* <sup>(4)</sup> which is a case on all fours with the case before us. In that case Sargent, C. J., observes:—"The defendant had obtained an order maintaining his attachment, and it was incumbent upon the plaintiff who impugns that order by the present suit to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money and that she had been since in possession." These cases establish the proposition that a party intervening, as the plaintiff did in this case, in the execution department and failing in his objections to an attachment and consequently being obliged to bring a suit under section 283 must give *primâ facie* evidence to establish the genuineness of the document upon which he relies. One case was quoted to us in which a different view was taken. That was the case of *Suba Bibi v. Balgovind Das* <sup>(5)</sup>

(1) [1887] A. W. N., 71. (2) [1899] A. W. N., 220. (3) [1896] I. L. R., 18 All., 369. (4) [1887] I. L. R., 12 Bom., 270. (5) [1886] I. L. R., 8 All., 178.

In that case Straight and Brodhurst, JJ., laid the burden upon the defendant. This decision loses weight from the fact that in the later case, Straight, J., resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath v. Bindra Ban*, which we have cited. Now the learned District Judge has considered the evidence from an entirely wrong standpoint and it is impossible for us to accept his conclusion on the question whether the sale to the plaintiff was real transaction or not, in view of the course adopted at the trial. We, therefore, as was done in *Govind Atmaram v. Santai*, set aside the decree and remand the case to the lower appellate court for re-trial. We accordingly remand the case with directions that it be replaced in the file of pending appeals in its proper number, and be disposed of on the merits, regard being had to the directions which we have given above. The costs here and hitherto will abide the event.

*Decree reversed, cause remanded.*

## BALWANT SINGH

*versus*

## SHANKAR.\*

*Land Revenue Act (III of 1901), Local—sections 56, 86—gharghanna  
—whether a Cess.*

*Held*, that a tax of half an anna payable to the zemindar by the tenant for occupation of house site and known as *gharghanna* was not a cess within the meaning of sections 56 or 86 of the Land Revenue Act, and the zemindar could maintain a suit for its recovery.

APPEAL under section X of the Letters Patent against the judgment of GRIFFIN, J.

Suit to recover rent.

*J. N. Chaudri*, for the appellant.

*Tej Bahadur Sapru*, for the respondent.

\* L. P. A. No. 69 of 1906.

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The judgment of the Court was delivered by

STANLEY, C. J.—The plaintiff appellant is the zamindar of the village of Radhakund in the district of Muttra, and the defendant occupies a house in the *abadi* of that village. The claim of the plaintiff is to recover three years' rent of the house so occupied by the defendant. Under the *wajib-ul-arz* of the village, the zamindar is declared to be entitled to one *taka* (that is, 6 pies) per month for every house from the occupants of the village and also from the owners of shops and temples. The defence set up by the defendant was that this rent had never been paid, and was not leviable by the plaintiff.

The court of first instance decreed the plaintiff's claim and this decree was affirmed on appeal, the lower courts finding that the alleged custom was proved. On second appeal, however, the learned Judge of this Court allowed the appeal, reversed the decision of the courts below, and dismissed the plaintiff's suit. The judgment is largely based on the meaning of the word "*gharghanna*," which is used in the *wajib-ul-arz* as descriptive of the money payable to the zamindars in respect of houses in the village. The learned Judge observes that the word "*gharghanna*" is understood to be a house-tax. For this no authority is cited. He also states that the contention on behalf of the defendants was that a house-tax is a cess, and that before a zamindar can recover a cess, it must first find a place in the list prepared by the Settlement Officer and be sanctioned by the Local Government as provided for by section 66 of Act No. XIX of 1873. The learned Judge then refers to section 56 and section 86 of the Land Revenue Act, III of 1901, and holds that reading these two sections together it was the intention of the Legislature that no demands apart from rent by a landlord against tenants should be recognized in the Civil Courts which had not been recorded by the Settlement Officer and sanctioned by the Local Government as regular cesses. Now in the first place we may point out that the only rent demanded by the zamindar in respect of the occupation of houses in the *abadi* of the village is this charge of half an anna per month. No other rent is payable. Section 56, therefore, has no application, because it refers to cesses

which are payable by tenants in addition to the rent paid by those tenants. The charge in question is not a charge in addition to any rent. It is in fact the rent paid in respect of the site upon which the house of the occupier stands, or in other words a ground-rent. Section 86 has also, we think, no application, for this reason, that the reservation sanctioned by the *wajib-ul-arz* of a monthly payment is the reservation of a ground-rent and not a cess within the meaning of the Revenue Act. We think that the learned Judge of this Court was wrong in the interpretation which he put upon the word "*gharghanna*" as used in the *wajib-ul-arz*, and that that word means nothing more than the rent payable in respect of the houses in the *abadi* of the village and is in no sense a house-tax or cess, as laid down by him. We therefore allow the appeal, set aside the decision of the learned Judge of this Court, and restore the decree of the lower appellate court with costs in all courts.

*Appeal decreed.*

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HANWANT SINGH AND OTHERS

*versus*

RAMGOPAL SINGH AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), section 588 cl. 18—Order rejecting an application for substitution—Appeal.*

*Held*, that an order rejecting an application made by persons claiming to be the legal representatives of a deceased appellant is an order within the meaning of section 588, clause 18 of the Code of Civil Procedure, and it is not necessary that the dispute referred to in section 367 of Civil Procedure Code, must be one between rival claimants as legal representatives.

APPEAL against the order of G. A. Paterson Esq., District Judge of Benares.

Suit for redemption.

The material facts are as follows:—One Dunia Singh, instituted a suit for redemption of certain immoveable property against Ramgopal Singh and others. The suit was

\* F. A. F. O. No. 62 of 1907.

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dismissed by the court of first instance under section 158 of the Code of Civil Procedure. Against this decree, Dunia Singh preferred an appeal to the Court of the District Judge of Benares. On the 9th February, 1907, Dunia Singh died. On 4th March, 1907, an application was put in by Hanwant Singh and others to be brought upon the record as legal heirs and representatives of the said Dunia Singh deceased. The application was rejected.

Applicants appealed.

*Baldeo Ram Dave*, for the respondents, took a preliminary objection that no appeal lay from the order appealed against. He submitted that the order in question could not be one under section 367 of the Code of Civil Procedure, inasmuch as the opening words of the section clearly contemplated a dispute between rival claimants as the legal representatives of a deceased appellant. Further the order appealed against was made, rejecting the application to be brought upon the record as legal representatives of the deceased. It was not therefore an order, admitting the applicants to be legal representatives of the deceased for the purpose of prosecuting the appeal. The following cases were cited :—

*Ahmad Ali v. Matabadal Lal*, [1881] I. L. R., 3 All., 844.

*Hamida Bibi v. Fusen Khan*, [1895] I. L. R., 17 All., 672.

*Subayyu v. Saminadayyar*, [1895] I. L. R., 18 Mad., 496.

*Balabai v. Ganesh Shankar Pandit*, [1902] I. L. R., 27 Bom., 162.

*Pandit Ikbal Narain v. Pandit Ratan Lal*, [1906] 10 Oudh Cases, 121.

*Haribans Sahai*, for the appellant.

The case was then argued on the merits.

The judgment of the Court was delivered by

*Aikman, J.*

AIKMAN, J.—One Dunia Singh brought a suit against the respondents for redemption of a mortgage. The suit was dismissed by the court of first instance. Dunia Singh filed an appeal against the decree of the first court, but died after filing the appeal. Within the time allowed by law, the appellants, who are admitted to be the sons of Dunia Singh's first cousins applied to be brought on the record as appellants in place of the deceased Dunia Singh. The mortgagees, defendants-respondents disputed their rights to be brought on the record

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on the ground that being of illegitimate birth they were not the legal representatives of the deceased. A considerable number of witnesses were examined and in the result the learned District Judge held that the appellants had been unable to successfully rebut the evidence adduced by the other side. He consequently dismissed their application. The present appeal has been preferred against the order of the learned Judge. For the respondents, a preliminary objection is raised that no appeal lies. If the order of the court below can be regarded as an order under sections <sup>367</sup>/<sub>582</sub> of the Code of Civil Procedure, there can be no doubt that a right of appeal is given by section 588, clause (18). Section 365 of the Code provides that the legal representative of a deceased plaintiff may, where the right to sue survives, apply to have his name entered on the record in place of the deceased plaintiff and the court shall thereupon enter his name and proceed with the suit. We think that this clearly applies to a case where it is not disputed that the applicant is the legal representative of the deceased. Here the applicants' claim to be regarded as the deceased's representative, was disputed. In our opinion, section 367 applies to this case. It is contended by the learned Vakil, for the respondents that section 367 only applies when there are rival claimants to represent the deceased. We see no reason for placing any such restriction on the meaning of the section. In the case *Subayya v. Saminadayyar* (1), the learned Judges say "We agree with the Judge that a dispute within the meaning of that section (*i.e.*, section 367) need not be between persons claiming to represent the deceased plaintiff."

[Their Lordships holding that the *onus* was on the opposite party to prove the case of illegitimacy, which they had set up, discussed the evidence on both sides, and held that the defendants failed to prove the plea of illegitimacy, and allowed the appeal.]

H. B. S.

*Appeal allowed.*

(1) [1895] I. L. R., 18 Mad., 496.

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STANLEY, C. J.  
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## RAGHUBAR DAYAL

versus

AKHTAR KHAN AND ANOTHER.\*

*Hindu Law—Widow—alienation by—Necessity—Reversioner—Right to set aside sale.*

When a Hindu widow sells property for a consideration the whole of which was advanced by the vendee for legal necessity, a reversioner cannot get the sale set aside even on payment of the entire sale price. *Govind Singh v. Baldeo Singh*, I. L. R., 25 All., 330; *Ramdei v. Abu Jafar*, I. L. R., 27 All., 494, distinguished.

FIRST APPEAL against the decree of Babu Shankar Nath Banerji, Subordinate Judge of Farrukhabad.

Suit for a declaration.

The facts are as follows :—

One Babu Kishun Sahai was the owner of certain property. He borrowed some money from one Babu Tulsi Ram. After his death, his widow, Thakurdei in lieu of the remaining portion of the debt due from Kishun Sahai, executed a sale-deed in favour of Muhammad Akhtar Khan. The plaintiff as reversioner brought the suit for setting aside the sale on the ground that it was not made for legal necessity. The court of first instance held that the whole of the consideration was for legal necessity, and dismissed the suit.

Plaintiff appealed.

*Tej Bahadur Sapru*, for the appellant cited,

*Gobind Singh v. Baldeo Singh*, [1903] I. L. R., 25 All., 330.

*Ramdei Kumwar v. Abu Jafar*, [1905] I. L. R., 27 All., 494.

*Sundar Lal* (with him *Ghulam Mujtaba*), for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—We think the decision of the learned Subordinate Judge is correct. It is admitted by Dr. Tej Bahadur that the sale was made for legal necessity, and indeed

\* F. A. 256 of 1906.

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the evidence which is discussed in the judgment of the learned Subordinate Judge shows that this was so. The case is therefore unlike the two decisions which have been relied upon by the learned Advocate, for the appellant, namely, *Govind Singh v. Baldeo Singh* <sup>(1)</sup>, and *Ramdei Kunwar v. Abu Jafar* <sup>(2)</sup>. In both those cases the sales were made partly for legal necessity and partly not. In this case, the entire of the property was sold for legal necessity. In such circumstances, it appears to us clear that the reversioner cannot recover any portion of the property on payment of the price paid by the purchaser. We therefore dismiss the appeal with costs, including fees in this Court on the higher scale.

*Appeal dismissed.*

(1) [1903] I. L. R., 25 All., 330.

(2) [1905] I. L. R., 27 All., 494.

## KALLU AND ANOTHER

*versus*

## FAIAZ ALI KHAN AND OTHERS.\*

*Hindu Law—Simple debt due by a widow—Legal necessity—Only life estate saleable in execution—Resjudicata between co-defendants.*

When a creditor lends money to a Hindu widow on her personal security and not upon any mortgage of her husband's property, any decree which he obtains on his simple money bond can only bind the rights and interests of the widow, even though the loan was incurred by her for legal necessity. *Dhiraj Singh v. Manga Ram*, [1897] A. W. N., p. 67, followed. *Mayne's Hindu Law*, para. 64, 7th edition, referred to.

The plaintiffs brought the suit for possession against the defendant, alleging that the mortgage which he held had been satisfied by the usufruct. The plaintiffs and the defendant were co-defendants to a suit for redemption which had been brought by a third party who represented only a portion of the equity of redemption. The plaintiffs who were defendants to that suit did not defend it, although they might have then pleaded that the plaintiff to that suit was not entitled to the whole of the equity of redemption, and that they had also an interest in it as reversioners. In their present suit the plaintiffs claimed possession of a portion of the property setting up their right to it as reversioners. *Held*, that their present suit was not barred by *res judicata*, although they might have pleaded their title as owner of a portion of the equity of redemption

\* S.A. 819 of 1906.

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in the former suit, as it was not incumbent on them to do so, and as the former suit was brought by a person representing a co-mortgagor who was entitled under the law to redeem the whole of the property and there could not be said to be any conflict of interest between the co-defendants to that suit, which it was necessary for the court to decide in order to give the relief claimed by the plaintiff to that suit.

SECOND APPEAL from the decree of J. Cuming Esq., Additional District Judge of Aligarh, affirming the decree of Babu Shiva Prasad, Munsif of Khurja.

Suit for possession.

The facts of the case were as follows :—

Two brothers Khawan Singh and Sher Singh who were separate made a mortgage of the property in dispute in 1858 to the predecessor in title of the defendant, Nawab Faiyaz Ali. Sher Singh then died. His heirs were his sons, the present plaintiffs. Khawan Singh died leaving Must. Gaura, his widow, as his heir. The plaintiffs were her heirs also. Sher Singh's equity of redemption was sold in execution of a simple money decree and was purchased by one Deo Kishan. Khawan Singh's widow Gaura, executed a simple money bond in favour of Deokishan in 1883. Deokishan sued on his bond and obtained a decree on 8th March, 1887. The equity of redemption of Khawan Singh's share was sold in execution of this decree and was purchased by Ganga Pershad on 21st January 1889. Ganga Pershad sold to Ramchander, brother of Deokishan, the share he had purchased on the 17th March 1892. Deo Kishan then sued for redemption of half the property. The parties to Deo Kishan's suit were (1) defendant Sir Faiaz Ali Khan (2) heirs of Sher Singh the present plaintiffs appellants and (3) Ram Chander. Ram Chander died during the pendency of the suit. Deo Kishan then amended his plaint claiming redemption of the whole alleging that he was an heir of his brother Ram Chander. The subordinate judge decreed Deo Kishan's suit on 13th September 1898, on payment of Rs. 1,000. The mortgagee and Deo Kishan filed separate appeals to the High Court. Deo Kishan died and was succeeded by the defendant no. 2, his widow Garga, who was substituted on the record for Deo Kishan. The present plaintiffs were no parties to the appeals. Ganga and Sir Faiaz Ali Khan the mortgagee compromised the dispute in the

appeals. Under the compromise Ganga got Rs. 4,000 and the decree of the Subordinate Judge was to be declared as *Kaladam i. e.*, non-existent. The High Court passed a decree in terms of the compromise.

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The present suit by plaintiffs was then brought as reversionary heirs of Khawan Singh for possession on the ground that there was no legal necessity for the loan taken by Khawan Singh's widow, Musammat Gaura. The defence was that the plaintiffs were parties to the former suit and their claim was therefore barred by Explanation II of section 13 Civil Procedure Code and that there was legal necessity for the loan. The Munsif held that the suit was not barred by *res judicata* but holding that the debt was taken for legal necessity and that therefore Khawan Singh's estate must be deemed to have been sold, he dismissed the suit. The plaintiffs appealed to the District Judge and the defendant mortgagee filed objection under section 561 Civil Procedure Code contending that the suit was barred by *res judicata*.

Plaintiffs appealed.

On the appeal coming on for hearing before GRIFFIN, J., His Lordship sent down an issue for trial *viz.*, as to whether the loan by Gaura was for legal necessity. The Judge found that there was legal necessity for the loan. The appeal then came on before KNOX, J. who referred it to a Division Bench.

*Tej Bahadur Sapru*, (with him *Gobind Prasad*), for the appellants. The Judge has found that the bond executed by Gaura was simple money bond; the suit was against her alone, and the decree obtained personally against her. The loan might have been taken for legal necessity but unless it distinctly and clearly appeared that some property was charged thereby or that the decree was against some property which she held as heir to her husband, nothing but what belonged to her *i.e.*, her life-interest could pass.

Mayne, Hindu Law and Usage, 7th ed., section 641.

*Dhiraj Singh v. Manga Ram*, [1897] A. W. N., 69.

As to *res judicata*, it is submitted that Deokishan was a co-mortgagor. The defendant and the plaintiffs were arrayed as co-defendants in the suit that Deokishan had brought for redemption. Even when upon the death of Ram Chandar.

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Deokishan amended his plaint and asked for redemption of the whole estate, the plaintiffs were not bound to put forward their claim. Deokishan was co-mortgagor and as such he could redeem the whole property. Now for the doctrine of *res judicata* being applied to co-defendants, *i.e.*, as between the present plaintiffs and the present defendant—it was necessary that there should have been a conflict of interest between them and that in order to give adequate relief to the plaintiff in that case—*i.e.*, to Deokishan—it was incumbent upon the court to adjudicate upon that conflict. The leading authority in this Court is

*Chajju v. Umrao*, [1900] I.L.R., 22 All., 386, 389.

Other cases are

*Ram Chandra v. Narayan Mahadeva*, [1886] I.L.R., 11 Bom., 216.

*Kameswar Pershad v. Rajkumari*, [1892] I.L.R., 20 Cal., 79.

*Magni Ram v. Mehdi Hossein*, [1903] I.L.R., 31 Cal., 95.

There could not have been any conflict between the defendant and the plaintiff; and even assuming there was, without deciding upon that conflict the relief claimed by Deokishan might have been granted. One co-mortgagor (such as Deokishan was) might redeem the whole mortgage, and the plaintiffs (who were equally interested) were not bound to defend the suit. Under the compromise made with the present defendant by Musammat Ganga, representative of Deokishan, all that the former acquired was Gaura's life-estate. When Gaura died that estate reverted to the plaintiffs, the reversioners to the estate of Gaura's husband, Khawan Singh. The principle of *res judicata* did not apply to their case. It was, therefore, submitted that in any point of view they were entitled to redeem.

*Abdul Majid* (with him *J. N. Chaudri* and *Rahmat-ul-lah*) for the respondent submitted that the rule that when a money bond was taken the whole estate did not pass did not always hold good. If there was necessity for the loan, as it had been found in this case, the whole estate would pass, and not the life-estate only.

*Sarabhai v. Maganlal*, [1901] I. L. R., 26 Bom., 206, 215.

*Radha Kishan v. Janki*, [1907] A. W. N., 155.

*Jugal Kishore v. Jotendro Mohun*, [1884] I. L. R., 10 Cal., 985.

As to *res judicata*. When Deokishan brought his suit Musammat Gaura had died. The plaintiffs' reversionary right had come into existence, and having notice of the suit, they ought to have set up their right in order to defeat Deokishan. Deokishan's suit further had not been brought in his capacity of a co-mortgagor but in that of a full owner of the property. When he was claiming redemption in that character the plaintiffs were bound to defeat his claim by putting forward their right and the adjudication of the conflict was necessary in order to give the proper relief to the plaintiff, Deokishan. The application for amendment presented by Deokishan enlarging his claim so far as the share of Khawan Singh was concerned ought to have been opposed, and if they did not do so, they ought to have set up their claim by way of defence which they in their character as plaintiffs are now seeking to enforce. They allowed an *ex parte* decree to be passed against them, and they cannot now be allowed to set up a dead claim. An *ex parte* decree may operate as *res judicata*. See.

*Behari Lal v. Majid Ali*, [1897] I. L. R. 24 All., 138.

*Tej Bahadur Sapru* was heard in reply.

The judgment of the Court was delivered by

KNOX, J.—This appeal arises out of a suit brought by the appellants, to recover possession of a half share in 76 bighas and 5 biswas which was mortgaged by two brothers Sher Singh and Khawan Singh, in 1858. The plaintiffs' allegation is that the mortgage debt has been satisfied by the usufruct. The brothers are said to have been separate, and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money decree, held by Deokishen, and was purchased by Deokishen himself. He is dead and is represented by his widow Musammat Ganga, respondent No. 2. Both the mortgagors Sher Singh and Khawan Singh are dead. Khawan Singh was succeeded by his widow Musammat Gaura who is also dead. The plaintiffs claim as heirs to Khawan Singh. It appears that Khawan's widow Musammat Gaura executed a simple money bond, on the 21st of December, 1883, in favour

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of Deokishen for the sum of Rs. 95. Deokishen got a decree on the bond, on the 8th of March, 1887. In execution of that decree, Gaura's rights and interests in the property mortgaged were sold, and bought by one Ganga Parshad. On the 21st January, 1889, Ganga Parshad sold these rights and interests to Ram Chander, brother of Deokishen. On the 17th of March, 1892, Deokishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor-in-title of Nawab Sir Faiaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chander, and (3) the present appellants, the heirs of the mortgagors. Ram Chander died during the progress of that suit, and Deokishen, alleging that he was Ram Chander's heir, amended his plaint, and asked to redeem the whole  $76\frac{1}{4}$  bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September, 1898, Deokishen got a decree for redemption of the whole property, subject to the payment of Rs. 1,000 to Nawab Sir Faiaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiaz Ali Khan, and the other by Deokishen. Deokishen died during the pendency of the appeal, and his widow Musammat Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December, 1900. Under the compromise, both the appeals were to be withdrawn. Musammat Ganga was to get Rs. 4,000, and the decree of the lower court for redemption was to be treated as if it never existed "*(kaladami)*". The court of first instance dismissed this suit, finding that the debt incurred by Musammat Gaura was incurred for legal necessity and that the sale in execution of the decree against her passed the whole of Khawan Singh's rights. One of the defences to the suit was that the plaintiffs' suit was barred by the decree passed in the suit of Deokishen, instituted on the 17th of March, 1892. This plea was over-ruled by the court of first instance. The plaintiffs appealed against the decree of that court dismissing their claim and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first court on the question of *res*

*judicata*. The learned Additional Judge, without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate court, the plaintiffs have preferred the present appeal. The first question we have to decide is whether the sale in execution of the decree on the simple money bond, executed by Musammat Gaura, was a sale only of her life interest in the property, or whether it passed the estate of her deceased husband Khawan Singh. As said above, the learned Munsif decided that the whole estate passed by the sale. In our opinion that decision cannot be supported. When Deokishen lent money to Musammat Gaura in 1883, he chose to do so on her personal security. He did not obtain from her any mortgage of her husband's property. That being so, we hold that any decree, which he obtained on his simple money bond, could only bind the rights and interests of his debtor on whose personal security he had advanced the money. Musammat Gaura is dead. She had only a widow's estate, and with her death, the rights and interests in the property in suit, purchased in execution of the decree against her, came to an end. In support of this view, we may refer to what is said in paragraph 641 of the 7th edition of Mayne's Hindu Law and to the case *Dhiraj Singh v. Manga Ram* (1).

This disposes of the first issue which we have to decide. The next question that arises is whether the present suit of the plaintiffs is barred by what took place in the suit for redemption instituted by Deokishen, in 1892. It is true that in that suit by the amendment of his plaint, Deokishen claimed to redeem the whole property. It appears that in that suit no issue was framed as to whether in point of fact, Deokishen did or did not own the whole equity of redemption, and consequently it cannot be said that the issue as to his owning the whole was "heard and finally decided" by the court. The learned Counsel, for the defendant, however, relies on explanation II to section 13 of the Code of Civil Procedure, which enacts that any matter which might and ought to have been made a ground of defence in a former suit shall be deemed to

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have been a matter directly and substantially in issue in that suit. As we have said, the present plaintiffs did not appear to defend the suit, and the decree was passed *ex parte* against them. The present plaintiffs might in that suit undoubtedly have raised the plea that Deokishen was not the owner of the equity of redemption of the whole of the property. But although they might have raised such a defence, we are of opinion that it was not incumbent on them to do so. It was not necessary for the court to decide the issue as to the extent of Deokishen's rights to enable it to pass the decree which it did. Deokishen admittedly owned a share in the equity of redemption, and that being so, he was entitled to redeem the whole. We hold that this being so, the plaintiffs as representatives of one of the co-mortgagors, were not bound in the previous suit to raise the issue as to whether or not Deokishen owned the equity of redemption over the whole. We hold therefore that the plaintiffs are not precluded by anything in the previous suit from maintaining their present claim. We have already held on the first question that we have to decide that the property itself did not pass at the sale in execution of the decree, obtained against Musammat Gaura, but only her rights and interests. The plaintiffs as the heirs of one of the original co-mortgagors are, therefore, entitled to maintain this suit for redemption. Issues were remitted to the lower appellate court to decide two questions of fact, namely, what was the amount secured by the mortgage which it is sought to redeem; and next whether or not that amount has been discharged by the usufruct of the property. On these issues, the lower appellate court has found first that the amount secured by the mortgage is Rs. 425/-, and next that the mortgage debt has long ago been discharged by the usufruct. Objections have been filed by the respondent. One objection is that on the finding of the lower appellate court that the mortgage debt has been satisfied long ago out of the usufruct, the suit of the plaintiffs is barred by limitation. This plea however was abandoned before us. Another objection has been raised as to the finding of the lower court in regard to the amount of the mortgage money. The respondents contend that the terms of the *wajib-ul-arz* of 1890 show that the amount secured by the mortgage was Rs. 1,000. We have

examined this wajib-ul-arz, and we agree with the construction, placed on it by the lower appellate court. We set aside the decrees of the courts below and decree the plaintiffs' claim as set forth in relief (a) of the plaint. The plaintiffs will have their costs here and in the courts below. Costs of this court will include fees on the higher scale.

This case was very ably argued by the learned Advocates for the parties, particularly by the learned Advocate for the appellants.

S. C. C.

*Appeal decreed.*

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## FULL BENCH.

RAMCHARAN DAS AND OTHERS

*versus*

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*Limitation Act (XV of 1877), section 19,—Acknowledgment—Natural guardian—Computation of limitation—Fresh start.*

*Held* BANERJI and RICHARDS, JJ., (STANLEY, C. J., dissenting) that when a natural guardian acknowledges a debt, such acknowledgment is by an 'agent duly authorised in this behalf' within the meaning of section 19 of the Limitation Act and gives a fresh start for the computation of limitation against the minor.

*Tilak Singh v. Chhutta Singh*, I. L. R., 26 All., 598, not followed. *Chinnaya v. Guru nathan*, I. L. R., 5 Mad., 169; *Sobhanair v. Srizamulu*, I. L. R., 17 Mad., 221; *Kailasa v. Ponnu*, I. L. R., 18 Mad., 456; *Subramania, v. Arumuga*. I. L. R., 26 Mad., 330; *Annapagauda v. Sangadigayapa*, I. L. R., 26 Bom., 221; *Narendra v. Rai Charan*, I. L. R., 29 Cal., 647; *Beti Maharani v. Collector of Etawah*, I.L.R., 17 All., 198, *Kamla v. Har Sahai*, A. W. N., 1888, 187; *Chinnery v. Evans*, 11 H. L. C., 115, referred to.

*Held* STANLEY, C. J., that the relation between a guardian and a ward is not that of an agent to a principal, but that of a trustee to a *cesti que trust*. A guardian is not competent to acknowledge a debt due from a minor so as to give a fresh start to the computation of limitation.

The difference between the manager of a Hindu family and a natural guardian of a minor pointed out.

\* F. A. 137 of 1906.

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FIRST APPEAL from the decree of Pandit Raj Nath Sahib, Subordinate Judge of Allahabad.

The plaintiffs appellants brought this suit for the recovery of Rs. 3,358-9-3, the balance of the account existing against the defendants' father Babu Lal. The defendants pleaded limitation. The plaintiffs relied on an acknowledgment which they said was made by the mother of the defendants during their minority in an application made to the District Judge for appointment of a guardian for the defendants after the death of Babu Lal. The Subordinate Judge dismissed the claim as being time-barred holding that an acknowledgment by a natural guardian was not one that was contemplated by section 19 of the Indian Limitation Act.

The plaintiffs appealed.

STANLEY, C. J., and BURKITT, J., referred it to a Full Bench on 24th March, 1908. The case came on before three Judges.

*Sundar Lal*, for the appellants.

The question was whether the natural guardian of a minor could acknowledge a debt so as to extend the period of limitation for the institution of suit to recover the same under section 19 of Act XV of 1877? The decision on the point turned entirely upon the interpretation of the words "*or by an agent duly authorised on this behalf*," occurring in explanation II of that section. The Allahabad High Court answered the question in the negative.

*Tilak Singh v. Chhutta Singh*, [1904] I. L. R., 26 All., 598.

The Bombay High Court in a Full Bench case took a contrary view. Section 4 of Act XIV of 1859, required the signature of the person against whom the acknowledgment was sought to be used. It was not clear whether under that section, an agent of the minor could sign the acknowledgment for him. In Act IX of 1871 and the present Limitation Act, all doubt on this point was removed by the addition of the necessary words to the section.

The further question was whether the term "agent" used in the explanation was limited to the case of an agent appointed

by a person *sui juris* to represent him. The term was not used in such a limited sense.

*Beti Maharani v. The Collector of Etawah*, [1894] I. L. R., 17 All., 198.

The Court of Wards constituted under the N.-W. P. Land Revenue Act of 1873, was held to be an "agent" within the meaning of the section. The Court of Wards might take the charge of the estate of a disqualified proprietor in spite of his protests. It derived no authority from the proprietor to act on his behalf but by virtue of the provisions of section 206 of that Act could acknowledge a debt. Similarly other persons not appointed by the debtor as his agents, had been held to be "agents" competent to acknowledge a debt. They were (a) the managing members of a joint family, (b) the guardians of minors appointed by law, (c) the natural guardians of minors and (d) the receivers of estates appointed by the court.

The powers of a natural guardian were as wide if not wider than those of a guardian appointed by law.

Maynes Hindu Law, (7th Edn.) pp. 273 & 283.

The guardian was bound to pay the debts due by his ward and was entitled to make part payments towards the same. If it was his duty to make a payment like this, the legal consequence which followed out of such payment under section 20 of Act XV of 1877 must follow.

The guardian could do anything which was for the benefit of the ward. The acknowledgment in this case was for the benefit of the ward.

*Narendra Nath v. Rai Charan*, [1902] I. L. R., 29 Cal., 647.

*Kailasa v. Ponnu*, [1895] I. L. R., 18 Mad., 456.

*Rai Bhalli v. Narain Lal Dorgabhai*, [1902] 4 Bom. L. R., 812.

Mayne's Hindu Law, (7th edition). Para. 211 at p. 273, and para. 218 at p. 283.

*Chinnery v. Evans*, [1864] 11 H. L. C., 115.

*Sobha Nadri Appa Rau v. Srizamulu*, [1894] I. L. R., 17 Mad., 221.

*Bhasker Taty Shet v. Vigo Lal*, [1893] I. L. R., 17 Bom., 512.

*Tej Bahadur Sapru*, for the respondents.

A natural guardian of a minor could not be his agent. The relation between the guardian and the ward was

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that of a trustee and a beneficiary. No one could become the agent of another except by the will of that other. He cited

Blackwood's Principal and Agent, p. 34.

It was obvious that the minor could not appoint an agent. Besides the most important words in Explanation 2 of section 19 were 'duly authorised in this behalf.' An agent duly authorised in this behalf must be a person having authority from his principal to make an acknowledgment of a debt within the meaning of section 19 of the Limitation Act. This could not be said at all of a guardian. It was not enough to say that an acknowledgment by him might be for the benefit of a minor. The test was whether he had any authority to make an acknowledgment. The powers of a natural guardian under the Hindu Law were not larger than those of any other guardian.

He then discussed the case of *Chinnery v. Evans*. He submitted that there, under an Irish Statute the receiver was found to make a payment. He was not acting as the agent of the mortgagor but under legislative authority. Similarly in the Privy Council case of *Beti Maharani v. The Collector of Etawah*, the Court of Wards acted not as an agent but under a certain statute. Besides the remarks of their Lordships of the Privy Council were *obiter*. In any case, that case was no authority for holding that a natural guardian could be an agent within the meaning of section 19 of the Limitation Act. He next submitted that the cases in which it had been held that a manager of a joint family could make a valid acknowledgment stood on a peculiar footing. There the interests of all were undivided and identical. He cited and discussed

*Annapagauda Sammangauda v. Sangaadigypa*, [1902] I. L. R., 26 Bom., 221.

*Kailasa Padtachi v. Ponnukunnu Sahi*, [1895] I. L. R., 18 Mad., 456.

*Narendra Nath Sarkar v. Rai Charan Haldar*, [1902] I. L. R., 29 Cal., 647.

*Baijonath Ram Goenki v. Hem Chandra Bose*, [1906] 10 C. W. N., 959.  
Blackwood's Principal and Agent, 2nd edition, p. 34.

*Lilley v. Foad*, [1899] L. R., 11 ch., 107.

*Lewin v. Wilson*, [1886] 11 A. C., 639.

*Chhato Ram v. Bilto Ali*, [1898] I. L. R., 26 Cal., 51.

*Syd-ud-din Hossain v. Lloyd*, [1883] 13 C. L. R., 112.

*Wajibun v. Kadir Buksh*, [1886] I. L. R., 13 Cal., 292.

*Maharana Shri Ranmal v. Vadi Lal*, [1896] I. L. R., 20 Bom., 61.

*Subrimania Ayyar v. Arumugachetty*, [1903] I. L. R., 26 Mad., 330.

*Chingaya Nayudu v. Gurunatham Chetti*, [1882] I. L. R., 5 Mad., 269.

*Sunderlal*, was heard in reply.

The following judgments were delivered.

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STANLEY, C. J.—This appeal was referred to a Full Bench in consequence of the conflict of authority upon the only question involved in it, namely, whether a natural guardian of a minor is competent to give an acknowledgment so as to give a fresh start for limitation within the meaning of section 19 of the Limitation Act. This section runs as follows :—“If before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.” Explanation (2) to the section gives a definition of the word ‘signed’ as used in the section as meaning “signed either personally or by an agent duly authorised in this behalf.” The person who gave the acknowledgment which is relied on by the plaintiffs appellants was Musammam Sundar Dei, the mother and natural guardian of the minor defendants. The appellants based their contention mainly on the ruling of a Full Bench of the Bombay High Court in the case of *Annappa-gauda v. Sangadi Gyapa* <sup>(1)</sup>, in which it was held overruling a decision of a Bench of the same Court in *Maharani Shri Ranmal Singhji v. Vadilal Vakhatchand* <sup>(2)</sup>, that an acknowledgment of a debt by a certificated guardian of an infant, would save limitation.

According to the section an acknowledgment must be signed either *personally*, that is, by the person liable to pay the debt or by *his agent duly authorised* in that behalf. It is

(1) [1902] I. L. R., 26 Bom., 221. (2) [1895] I. L. R., 20 Bom., 61.

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clear that signature by a guardian is not a signature by the debtor personally, and therefore we must consider whether a natural guardian is an agent duly authorised to give acknowledgments, within the meaning of the section.

Let us first see what is the relationship existing between a minor and his natural guardian. The Hindu Law vests the guardianship of a minor in the Sovereign as *parens patriae*. According to Manu "The King shall protect the inherited and other property of the minor until he has returned from his teacher's house or until he has passed his minority" (Chapter VIII section 27). The same is the law in England. The King as *parens patriae* is the guardian of minors. But from the earliest times the Court of Chancery representing in the person of the Lord Chancellor the authority of the Sovereign, exercised jurisdiction in the matter of the wardship of infants and the care of their estates. A similar jurisdiction is exercised by the courts in this country. A suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of court, and the court acting in the place of the Sovereign may pass such orders generally for the benefit of the minor and the protection of his property as it thinks fit. Necessarily the duty which vests in the Sovereign is delegated to the minor's relations, and of these the father and next to him the mother is the natural guardian. Under the Guardian and Wards' Act, a guardian stands in a fiduciary relation to his ward (section 20), and as regards the property of his ward, he is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own and subject to the provisions of the Act, he may do all acts which are reasonable and proper *for the realisation, protection or benefit of the property*. A natural guardian is a trustee with powers of management of his ward's estate and has as such very extensive powers. But the question before us is not, I think, one in which we have to determine so much the powers of a guardian as the relationship which subsists between a guardian and his ward. Whether in fact that relationship is, in any case, the relationship of principal and agent. Unless the relationship of principal and agent subsists between a natural guardian and his ward, it seems to me that it would be difficult to hold that such guardian can be regarded as an agent within the meaning of section 19 of the Limitation Act.

"The relation of guardian and ward," observed Lord Romilly, M. R., in *Mathew v. Brise* <sup>(1)</sup>, "is strictly that of trustee and *cestui que trust*. I look upon it as a peculiar relation of trusteeship, and this appears from the case of the *Duke of Beaufort v. Berty*. A guardian is not only a trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant, with many duties to perform, such as to see to his education and maintenance." Then he quotes Lord Macclesfield's words, namely, "that guardians were but trustees and that the jurisdiction of the court was grounded upon the general power and jurisdiction which it had over all trustees, and a guardianship is most plainly a trust." The relation of a principal and agent is different. A good deal of the arguments addressed to us dealt with the powers of guardians and managers of Hindu families, and too little I think with the words of the Statute which we have to interpret. I take the word 'agent' and ask the elementary question "who is an agent?" Story (p. 2, 8th edn.) defines Agency thus:—"In the common language of life he who being competent and *sui juris* to do any act for his own benefit or on his own account, employs another to do it, is called the principal, constituent, or employer; and he who is thus employed is called the agent, attorney, proxy, or delegate of the principal constituent or employer. The relation thus created between the parties is termed an agency. The power thus delegated is called in law an authority." The relation of agency exists and can only exist by virtue of the express or implied assent of both principal and agent except in certain cases of necessity in which such relation is imposed by operation of law" (Bowstead on Agency, 2nd edn. 15) *Markwick v. Hardingham* <sup>(2)</sup>. "An agent," to use the definition contained in the Indian Contract Act "is a person employed to do any act for another, or to represent another in dealings with third person." An infant cannot employ such an agent (Indian Contract Act, section 123). Except in a very loose sense of the word never can the term agent, as it seems to me, be applied to a person who occupies the position of a trustee. No doubt any one who does any act for another may be described as agent of that person. But strictly speak-

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<sup>(1)</sup> [1851] 14 Beav., 341.<sup>(2)</sup> [1880] 15 Ch. D., 349.

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ing the word agent is used to denote a person who is employed by a principal to act for him generally or to do some particular act only and cannot be properly applied to a trustee. The relationship is not necessarily a contractual one. Agents may be appointed under powers of attorney or in writing or by word of mouth to do acts for their principals. The parties so appointed may act or not as they please. If they do act the relationship between them and the principals is not contractual.

Let me refer now to the case I have mentioned above, in which it was decided that a guardian appointed under the Guardian and Wards Act can sign an acknowledgment of liability in respect of a debt or pay part of the principal, so as to extend the period of limitation against his ward. The learned Chief Justice Sir Lawrence Jenkins in his judgment, quoted the case of *Chinnery v. Evans* <sup>(1)</sup> as establishing the proposition that it was not necessary for the validity of an acknowledgment by an agent that the relationship should be contractual. By 'contractual' I presume he meant that the agent need not be actually appointed by the party chargeable. In that case, a payment made by a receiver appointed under the Irish Statute 11 and 12, George III, Cap. 10, was held to be a payment which took a case out of the Statute of Limitation, 3 and 4 William IV Cap. 27, which requires that such payment should be made by the party chargeable or his agent. The learned Chief Justice also quoted the passage from the judgment of the Judicial Committee in *Beti Maharani v. The Collector of Etawah* <sup>(2)</sup>, ending with the words "It is difficult to see how a Sarbarahkar not being guardian can be authorised to admit a personal liability. The point has not been carefully inquired into, and in the absence of accurate knowledge, their Lordships will only say that Raj Kunwar's (the Sarbarahkar's) authority seems very doubtful" and he says "It would be straining these words too much to spell out of them an authoritative pronouncement that the guardian of one under disability could be an agent for the purposes of the Limitation Act, but at least it is evident that such a proposition did not strike their Lordships as in any way preposterous." In that

(1) [1864] 11 H. L. C. 115.

(2) [1894] 1 L. R., 17 All., 198

case, the acknowledgment relied on was by the Court of Wards exercising jurisdiction under the North-Western Provinces Land Revenue Act of 1873. Section 203 of that Act defines the Court's power thus :—" The Court of Wards shall have power to give such leases or farms of the whole or any part of the property under its charge and to mortgage or sell any part of such property and to do all such other acts as it may judge to be most for the benefit of the property, *and the advantage of the disqualified holder.*" The learned Chief Justice in his judgment observes " There is nothing in the Act which could constitute the Court of Wards the person against whom the debt was claimed ; therefore it is only as the agent for Raj Kunwar duly authorised in that behalf that it could have signed the acknowledgment of the debt. The Court's agency was manifestly not contractual, so that we have in this case a further warrant for considering (notwithstanding the decisions to the contrary) whether a guardian can be his ward's agent for the purpose of making a payment that will attract the consequences prescribed in section 20." I may, here, point out that the Court of Wards, as the Receiver in *Chinnery v. Evans*, is the creature of the Legislature and derives its authority by Statute. With due deference to the learned Chief Justice, I am wholly unable to agree with him that the Court of Wards was, in any sense, the agent of Raj Kunwar. It acted under the authority of the Legislature and not under the authority of Raj Kunwar or anybody else. It may be that Raj Kunwar is a clerical error and that the ward Pirthi and not Raj Kunwar was intended. Then adverting to the question whether a guardian can be his ward's agent, he says " In my opinion, he can be such an agent, if it can be said he is "duly authorised in that behalf," and he is "duly authorised in that behalf," if as between himself and his ward he has a right to make the particular payment. To determine this right, we must look to the Guardians and Wards Act. It is provided by the 27th section of that Act that "A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it, if it were his own, and subject to the provisions of this chapter he may do all acts which are reasonable and proper for the realization, protection and benefit of

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the property." Therefore in each case, it must be seen whether the particular payment answers this description. If on the facts it appears that it does then as to that payment the guardian is an agent of the minor duly authorised in that behalf, otherwise he is not." Then coming to the question whether a guardian's signature to an acknowledgment has any operation, under section 19 of the Limitation Act, holding that *Beti Maharani's* case was of special value, as it was there evidently thought that the Court of Wards could give an acknowledgment, by parity of reasoning he came to the conclusion that "a guardian can sign an acknowledgment for the purposes of section 19 of the Guardians and Wards Act," subject to the qualification that in each case it must be shown that the guardian complied with the conditions of section 27 of the Guardians and Wards Act, and that in each case the guardian's act was for the protection and benefit of the ward's property.

Now the suit of *Chinnery and Evans* arose under the Statute of Limitation, 3 and 4 William IV, Cap. 27, which requires that a payment in order to take a case out of the Statute must be made by the party chargeable or his agent, and the question was whether in that case, the payment was so made. The payment was made by a receiver, appointed under the Irish Statute 11 and 12, George III, Cap. 10, which enacted that in all cases when one and a half years interest shall be due, the Court of Equity upon application in the manner hereinafter mentioned, shall appoint a receiver to receive such parts of the rents of the mortgaged premises as shall be sufficient to pay such arrears of interest, and also the accruing interest of the said mortgage money, from time to time, one half year when the other shall become due, until the whole of such interest due on the mortgage shall be discharged." The contest in that case was whose agent the receiver was, and it was held that the receiver was the agent of the mortgagor, and that any payment made by him in pursuance of the order is payment in law by the legal agent of the person liable to pay. By the act of the Legislature the receiver was appointed the agent of the mortgagor for the purpose of paying interest. We get little help from this case. The learned Chief Justice indeed only relied on it as establishing that the relation of a

principal and his agent, who gives an acknowledgment of a debt by the principal, need not be contractual. As I have already pointed out the relation of principal and agent is not necessarily contractual; a person to take a common illustration may be appointed by power of attorney to do an act for another and no contractual relationship arises. The receiver was by the act of the Legislature appointed agent of the mortgagor to make payments of interest and therefore the payment was binding on the mortgagor. There is no enactment of the Legislature that a guardian, whether a natural or a certificated guardian, shall be such agent. In the case of a certificated guardian the Legislature empowers such guardian to do such acts as are reasonable and proper for the realisation, protection or benefit of the property of his ward. It does not prescribe that he shall be his ward's agent for any purpose. He acts as trustee not as agent. Then the learned Chief Justice holds that a guardian has authority to give an acknowledgment not in all cases but only in cases in which it is shown that his act was for the protection and benefit of the ward's property. According to this view the guardian is not the duly authorised agent to give an acknowledgment on behalf of an infant unless it can be shown by the party who relies on the acknowledgment that the guardian's act was for the protection and benefit of the ward's property. As to the authority of the Court of Wards to give an acknowledgment, the learned Chief Justice was of opinion that the Judicial Committee considered that an acknowledgment by the Court of Wards would operate under section 19 and he seemed to think that there was a close analogy between the case of a guardian appointed under the Guardians and Wards Act and the Court of Wards. I confess that I am unable to see that there is any such analogy. The Court of Wards is created by Statute and it performs as it seems to me, the duties of the Sovereign as *parens patrie* and has very large powers under the North-Western Provinces and Oudh Court of Wards Act, III of 1899, which superseded the earlier Act to which the learned Chief Justice referred, namely, the North-Western Provinces Land Revenue Act of 1873 as it also had under the repealed Act. Section 35 of the latter Act provides that "the Court of Wards can mortgage or sell the whole or any part of the property under

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its superintendence and may give leases and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for *the advantage of the ward or for the benefit of the property.*" In the earlier Act likewise under section 203 the Court was empowered to do "all such other acts as it may judge to be most for the benefit of the property and *for the advantage of the disqualified proprietors.*" In both these Acts very wide powers are given not merely for the benefit of the property of the ward but also for his advantage. In the case of the Guardian and Wards Act these wide powers are not given to a guardian. Section 27 of it only gives power to a guardian of the property to do all acts "which are reasonable and proper *for the realization, protection, or benefit of the property.*" It is hard to see how the acknowledgment of a debt can be regarded as an act done for the protection or benefit of property. Then it is to be remembered that the powers of the Court of Wards are conferred by the Legislature and not by the proprietor whose estate is under its management. It seems to me therefore that the case of *Beti Maharani* and *the Collector of Etawah* throws but little light on the question before us. Then the learned Advocate for the appellants relied upon the large powers which the manager of a joint Hindu family possesses in regard to the management of the estate of the joint family and the payment of debts. It appears to me that there is no close analogy between the case of such a manager and that of a natural guardian of a minor. The powers of a manager of a joint Hindu family are based on the oneness or unity of the family. The manager represents the common interests of the family which is regarded as a corporation, union and undivided interests being the rule. But such a manager is not an agent for the other members of the family. Their Lordships of the Privy Council thus defined his position recently "Such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent or of partners; it is much more like that of trustee and *cestui que trust*". *Aunamalai Chetty v. Murugasa Chetty*" (1).

(1) L. R. 30 I. A., at p. 228.

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Now I have shown that the relation subsisting between a guardian and his ward is not that of principal and agent but that of trustee and *cestui que trust*; that an agency can only exist by virtue of the express or implied assent of both principal and agent, except in certain cases of necessity, and that an infant can not appoint an agent. What the powers of a guardian generally are is, I think, beside the question when we are called upon to interpret the meaning of a section such as section 19 of the Limitation Act. The section gives a new starting point for limitation in a case where an acknowledgment of liability has been made in writing, signed by the party against whom property or a right is claimed, and the word signed is defined as meaning either personally or *by an agent duly authorised* in this behalf. It is obvious, as I have said, that signature by a guardian is not a personal signature by his ward, and therefore the question which we have to determine is whether a guardian is an "agent duly authorised in this behalf," that is to give an acknowledgment. It seems to me that we must interpret agent in this section in its ordinary sense, that is, as a person employed by a competent person to give the acknowledgment.

In articles 89 and 90 of the second schedule to the Limitation Act, we find that the word used in its ordinary sense, and it is to be presumed that the same meaning was intended for it in every part of the Act. A guardian is not employed by his ward, and he has not up to the present at least been constituted by the Legislature his ward's agent. Then an agent must be authorised to give the acknowledgment. The ward not being competent to appoint an agent can not give any such authority. A guardian, therefore, can not, I think, be an agent within the purview of the section. In this case, Musammat Sundar Dei, the mother and natural guardian of the minors, did not purport to give the acknowledgment as their agent but as their guardian, and as such guardian, I am of opinion, she had no authority to give the acknowledgment. She was not an agent duly authorised to give it.

But it is said that a minor may suffer grave injury if it be the case that his natural guardian can not give an acknowledgment of a debt that creditors will be compelled to take legal proceedings to enforce their rights to the detriment of the minor and his property. I do not apprehend

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that any such serious consequences would arise. In any case of difficulty or doubt it is always open to the guardian of a minor to place the minor under the protection of the court, and I am disposed to think that in the majority of cases, the intervention of the court would be not only desirable but in the highest degree for the interests of minors. If a creditor is forced to take legal proceedings for the recovery of a debt then upon the institution of a suit, the minor becomes a ward of Court and the Court when satisfied that the debt is *bona fide* and is owing can pass such orders for the payment of it as it thinks fit, and protect the minor's property so far as possible. It would be not unattended with danger to recognise a right in a Hindu mother as guardian of her infant sons to give acknowledgments of debts. A Hindu lady is as a rule *pardanashin* and unacquainted with business, and so quite incapable independently of others to protect the property of her minor sons. On whichever side, however, the weight of convenience lies, we are bound by the express words of the Statute and I see no reason to resile from the view which was expressed by my brother Burkitt and myself in the case of *Tilak Singh v. Chhattar Singh* <sup>(1)</sup>. I would, therefore, dismiss the plaintiffs' suit.

*Banerji, J.*

BANERJI, J.—This appeal arises in a suit brought by the plaintiffs appellants to recover money alleged to be due to them by Babu Lal, the deceased father of the defendants who are minors. It is stated that the dealings between the plaintiffs and Babu Lal continued till the 9th of February, 1900. As the present suit was instituted on the 4th of August, 1905, it was on the face of it beyond time. The plaintiffs, however, invoke in aid certain payments and acknowledgments made after the death of Babu Lal, in order to take the case out of the operation of the statute of limitation, and the question before us is whether those payments, and acknowledgments save the operation of limitation.

It appears that after the death of Babu Lal, Musammat Sundar Dei, the mother of the minor defendants, applied to the District Judge of Allahabad, for a certificate of guardianship. Her application was granted on condition of her furnishing security. As security was not furnished, no certificate was issued.

(1) [1904] I. L. R., 26 All., 598.

Meanwhile the court permitted Sundar Dei to sell the stock in trade of a shop which Babu Lal used to carry on in his life-time, and the proceeds of the sale were deposited by her in court. A part of these proceeds was paid, under the orders of the court, to the plaintiffs on the 30th of September, 1902. Musammat Sundar Dei, as guardian of the minors, also acknowledged liability for the debt due to the plaintiffs. The plaintiffs rely upon this payment by the court and the acknowledgments made by Sundar Dei.

As for the payment, it can not, in my opinion, be of any avail to the plaintiffs. It was not a payment of interest as such within the meaning of the first paragraph of section 20 of the Indian Limitation Act, and even if it was a payment of a part of the debt by the debtors or their agent duly authorised in that behalf the fact of the payment does not appear in the hand-writing of the person making it. It is manifest from the provisions of the section that the part payment must appear in the hand-writing of the debtor or his authorised agent. In the present case, the payment appears in the hand-writing of the District Judge, who was certainly not the agent of the defendants.

There remains the question of the acknowledgments made by Sundar Dei. If they are valid acknowledgments within the meaning of section 19, the claim is not time barred. As Sundar Dei did not obtain a certificate of guardianship, she must be deemed to have acted as the natural guardian of the minors. The question then arises whether an acknowledgment by the natural guardian of a minor is a sufficient acknowledgment within the purview of section 19, and this is the main question to be determined in this case. The course of rulings on the point is not uniform and the question is not free from difficulty. The legislature proposes to solve the difficulty by an amendment of the Limitation Act, and by declaring such acknowledgments to be valid. The determination of the question before us is therefore necessary only for the purposes of the present case and of cases similar to it. After giving the matter my best consideration, I am of opinion that an acknowledgment by the natural guardian of a minor acting within scope of his authority as guardian, is an acknowledgment within the purview of section 19, and

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saves the operation of limitation. Under that section, the acknowledgment must be made in writing and signed by the party against whom any property or right is claimed "either personally or by an agent duly authorised in this behalf." Is a natural guardian an agent duly authorised within the meaning of the section? It is contended that an agent must be appointed by the principal and as a minor can not appoint an agent, an acknowledgment of liability can not be made on behalf of a minor. I am unable to agree with this contention. There may be an agent by operation of law. An agent has been defined to be a person having express or implied authority to represent or act on behalf of another person" and "the relationship of principal and agent may arise (a) by express appointment by the principal; (b) by implication of law from the situation of the parties" (Bowshead's Digest of the Law of Agency, pp. 1 and 11). That it is not necessary that an agent must be appointed by the principal is manifest from the fact that a receiver, an executor, the manager of the Court of Wards and the manager of a joint family can be regarded as agents. And it has been held that these persons are competent to make part payment or to acknowledge a debt which would bind a minor or a ward or the estate in charge of the receiver or executor. In *Chinnery v. Evans* <sup>(1)</sup>, it was held that payment by a receiver in charge of the estate of a mortgagor is "payment in law by the legal agent of the person liable to pay." In *Beti Maharani v. The Collector of Etawah* <sup>(2)</sup>, their Lordships of the Privy Council were of opinion that an acknowledgment by the Court of Wards saves limitation. They observe "If there has been a valid acknowledgment by Ajudhia and also by the Court of Wards as contended, the right of suit is saved" Further on they say: "It is difficult to see how a sarbarahkar, not being guardian, can be authorized to admit a personal liability" and they hold that the act of the Court of Wards would bind the ward (p. 208). The Court of Wards not being the party liable for the debt, an acknowledgment of debt by it, such as saves limitation, can only be an acknowledgment as agent of the ward. This Court has held in *Kamla Kuar v. Har Sahai* <sup>(3)</sup>,

(1) [1864] 11 H. L. C., 115.

(2) [1894] 1 L. R., 17 All. 198.

(3) [1888] W. N., p. 187.

that an acknowledgment by the Court of Wards gives a fresh start for the computation of limitation..... It has also been held that the manager of a joint Hindu family can validly acknowledge debts on behalf of minor members of the family. As under section 21 of the Limitation Act, an acknowledgment by one of several partners does not save limitation against another; an acknowledgment by the manager of a joint Hindu family cannot be regarded as an acknowledgment by a partner, and can only be deemed to be an acknowledgment by an agent. The manager of a joint Hindu family is no doubt something more than a mere agent but for the purposes of an acknowledgment under the Limitation Act, his act can only be that of an agent. It is clear that the persons referred to above none of whom were appointed by the party liable for the debt, may still be his agent by operation of law. The natural guardian of a Hindu minor may do all acts which the minor himself could have done if he were of full age, and the acts of the guardians would be binding on the minor, if they are for his benefit and advantage. A guardian is competent to sell and mortgage the minor's property, if it is necessary to do so in the interests of the minor. The powers of a guardian under the Guardians and Wards Act are similar and so are the powers of the Court of Wards. It is surely the duty of the guardian, as of the Court of Wards to discharge the debts of the ward with the income of his estate in whole or in part or to pay interests as such in order to keep down the debt. If the guardian pays interest or makes part payment, he does so in the interests of the minor, and such payments are binding on the minor. If the payment appears in the hand-writing of the guardian, it would, in my opinion, save the operation of limitation under section 20 of the Limitation Act, the payment being one by an agent authorized to make it on the minor's behalf. If the guardian can make part payments, he can also acknowledge a debt not already time barred, if it is in the interests of the minor to do so. As the guardian is not the party liable, he makes part payment or acknowledgment on behalf of his ward, and therefore as his agent and when such payment or acknowledgment is made for the benefit of the minor, the guardian acts within the scope of his authority, and acts as an agent duly authorized in this behalf. I am unable to see

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any distinction in principle between a part payment by a guardian and the acknowledgment of a debt by him. In my judgment, when a guardian acting within the scope of his authority and for the benefit of a minor makes part payment of a debt or acknowledges a debt, the part payment or acknowledgment is by an agent duly authorized in this behalf and gives a fresh start for the computation of limitation. The weight of authority is in favour of this view. In *Chinnaga Naydu v. Gurunatham Chetti*<sup>(1)</sup>, it was held by a Full Bench of the Madras High Court that the manager of a Hindu family has the same authority to acknowledge as he has to create a debt and this, as I have shown above, he can do as agent of the other members of the family and not as partner.

In *Sobhandri Appa Rau v. Srisamulu*<sup>(2)</sup>, a bench of the same Court presided over by MUTTUSWAMI AYYAR, J., held that a guardian has authority to acknowledge a debt on behalf of the minor. In *Kailasa Padiachi v. Ponnu Kannu*<sup>(3)</sup>, the same learned Judge expressed the opinion that "a guardian is legally competent, in the ordinary course of management either to acknowledge a debt due by his or her ward or to make a part payment or to pay interest. A similar view was held by SIR ARNOLD WHITE, C. J., and BENSON, J. in *Subramania Ayyar v. Arumuga Chetty*<sup>(4)</sup>.

A full Bench of the Bombay High Court held in *Anuappagauda v. Sangadiyapa*<sup>(5)</sup>, that a guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability provided it be shown that the guardian's act was for the protection or benefit of the ward's property. An earlier ruling to the contrary was overruled.

The Calcutta High Court in two cases held the contrary view but in the recent case of *Narendra Nath Sarkar v. Rai Charan Haldar*<sup>(6)</sup>, RAMPINI, and PRATT, JJ., held that a guardian of a minor is an agent duly authorized to pay interest upon a debt due by the minor. It is difficult to follow the reasoning by which the learned Judges distinguished the case of part payment from that of an acknowledgment in the case of a guardian. If a guardian is the minor's authorized agent in the one case, he must be so in the other.

(1) [1882] I. L. R., 5 Mad., 169. (2) [1894] I. L. R., 17 Mad., 221.

(3) [1895] I. L. R., 18 Mad., 456. (4) [1903] I. L. R., 26 Mad., 330.

(5) [1902] I. L. R., 26 Bom., 221. (6) [1902] I. L. R., 29 Cal., 647.

The only case in this Court which is against the appellant's contention is that of *Tilak Singh v. Chattar Singh* <sup>(7)</sup>, in which it was held that part payment by the mother and natural guardian of a minor is not a payment by an agent within the meaning of section 20 of the Limitation Act. With great respect for the learned Judges who decided that case, I am unable to agree with them.

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That an acknowledgment of a debt by a guardian may be for the benefit and advantage of a minor can admit of no doubt. The present case is an instance in point. Had the mother of the defendants not acknowledged the debt due to the plaintiffs, the property of the minors would at once have been sold, whereas, as the petition of Sundar Dei, dated 4th September, 1902, shows a portion of the interest was remitted, and the minors were said to have benefited to the extent of Rs 1,441-7-0. This benefit the minors would not have obtained save for the action taken by their mother and guardian. It is difficult to see how this benefit could be attained by obtaining a certificate of guardianship, and placing the minors under the protection of the court. In the present case, Sundar Dei did apply for a certificate of guardianship, but she was unable to furnish security as required by the court, and therefore the minors could not be placed under the protection of the court. Upon the evidence on the record, I am of opinion that the acknowledgment of the debt due to the plaintiffs by the mother and guardian of the minor defendants was for their benefit, and it was not even hinted in the argument before us that it was not so. No useful purpose would therefore be served by asking the court below to find whether the acknowledgment was beneficial to the interests of the minor. In my judgment the acknowledgment made by Sundar Dei saves the operation of limitation under section 19 of the Limitation Act, and the court below was wrong in dismissing the suit on the ground of limitation. I would, therefore, allow the appeal, and setting aside the decree of the court below remand the case to that court under section 362 of the Code of Civil Procedure, for trial of the other issues raised by the defendants.

RICHARDS, J.—This was a suit to recover a sum of

(7) [1904] I. L. R., 26 All., 598.

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Rs. 3,358-9-3 against the minor defendants, as heirs and representatives of one Babu Lal, deceased. The facts are not disputed and are shortly as follows :—

The plaintiffs advanced to Babu Lal, the father of the defendants, a sum of Rs 35,662-4-3 bearing interest at the rate of 8 annas per cent per mensem. During his life-time, Babu Lal paid up Rs 32,350-8-0, leaving Rs 4,221-8-0, still due for principal and interest. At his death, Babu Lal was possessed of a considerable amount of property and he died on the 5th of March, 1906, leaving his minor sons the defendants and his widow Musammat Sundar Dei him surviving. The minor defendants became entitled to the property left by Babu Lal as his heirs. The decree claimed is only against the assets of the deceased in the hands of the minor defendants. The plaintiffs do not seek to make the minor defendants personally liable. Musammat Sundar Dei applied for a certificate of guardianship of the minors and her application was granted by the District Judge of Allahabad, but subject to a condition that she would give security for the due administration of the property of the minors. Musammat Sundar Dei was never able to fulfil the condition as to security with the result that her appointment fell through, and we must regard her as simply the natural guardian of the minors.

Meantime efforts were being made to arrange the debts due to the plaintiffs and others. Musammat Sundar Dei presented a petition to the District Judge clearly admitting the debt. Babu Lal had carried on a shop business in his life-time, and Musammat Sundar Dei with the approval of the District Judge sold some of the property, the amount realised was brought into the court of the District Judge, and on the application of Musammat Sundar Dei was paid over to the plaintiffs in reduction of their debt. In the course of those proceedings, Musammat Sundar Dei more than once admitted the debt. The plaintiffs abandoned part of the interest due and the debt was thus reduced by a sum of Rs. 2,003-6-1. This payment was made before the period of limitation had expired and within 3 years of the institution of the suit. The debt was no doubt reduced both as to principal and interest but the fact of the part payment of the principal does not ap-

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pear "in the hand-writing" of Musammat Sundar Dei, and the learned Advocate, for the appellant did not contend that the facts amounted to a payment of interest "as such" by Musammat Sundar Dei and was apparently content to rest his case on the provisions of sections 19 of the Limitation Act. Musammat Sundar Dei, on behalf of the minors, on numerous occasions, admitted the debt due to the plaintiffs and it is not disputed that if her acknowledgment could legally bind the minors, the acknowledgment which she, in fact, made, was amply sufficient to prevent the debt being barred by limitation. The proceedings in the District Judge's Court were not regular and I only refer to them because they demonstrate that all parties were acting *bona fide* in the interests of the minors and their property. The minor defendants plead limitation, and say that they are not bound by the acknowledgments made by their mother. Musammat Sundar Dei was the natural guardian of the minors, according to Hindu Law. Beyond all questions, she acted throughout in the interests of the minors. If the debt had not been reduced and if the guardian had not made the acknowledgments but had taken up a hostile attitude and put the plaintiffs at arms length, the latter would unquestionably have at once sued the minors. The mother was anxious, and properly anxious, to avoid a suit by the plaintiffs, and for this reason she entered into the negotiations in the course of which the payments were made, and the acknowledgments were given, and as a result a suit was averted. I hold that Musammat Sundar Dei acted in the interests of and for the benefit of the minors whose natural guardian she was.

According to Hindu Law, the powers of a natural guardian acting *in the management of the minor's property*, and in the interests of the minors are practically unlimited. The guardian can sell or mortgage the minor's property, and in my opinion, a natural guardian could certainly legally pay a debt of the minors and obtain a good discharge. Indeed it seems to me that if a natural guardian neglected to pay a just debt of the minor, and allowed a suit to be brought, he would be acting contrary to his clear duty. Section 20 of the Limitation Act provides that when interest on a debt or legacy is before the

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expiration of the prescribed period paid *as such* by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf or when part of the principal of a debt is before the expiration of the prescribed period paid by the debtor or by his agent duly authorised in this behalf, a new period of limitation should be computed. Provided that in the case of part payment of the principal of the debt, the fact of the payment appears in the *hand-writing* of the person, making the same. As already pointed out, the learned advocate for the plaintiffs does not rest his case on section 20, but I quote the section as I think a consideration of its provisions helps us to consider the provisions of the preceeding section 19. Had Musammatt Sundar Dei made a payment of interest *as such*, or if the fact of part payment of the principal appeared in her hand-writing, I think it could hardly have been said that the payments were not made by the duly authorised agent of the minors within the meaning of the section. The guardian was the person empowered by Hindu Law to manage the minor's property, and in a case like the present with a duty to make the payment. Indeed it seems to me that it might well be said that the act of the guardian was in law the act of the minors themselves. I think it necessary that we should remember that we are applying the provisions of an Indian Act to a state of facts which could never arise in England, but which must arise every day in India. Under the Law in England, the entire estate of a deceased person vests in his executor or administrator, and the executor or administrator although he may have no beneficial interest whatever in the estate, is bound to pay the debts of the deceased to the extent of the assets, and can certainly make a part payment or give an acknowledgment so as to prevent a debt being barred by limitation. It would make no difference that the persons beneficially interested in the estate were minors or under any other disability. We must however assume that under the circumstances of the present case, the plaintiffs cannot claim the benefit of section 20.

Section 19 provides "if before the expiration of the period prescribed for a suit.....an acknowledgment of liability has been made in writing, signed by the party or by some person through whom he derives title or liability a new period,

shall be computed." Two explanations follow, and explanation II is as follows :—

"In this section signed means either personally or by aid agent duly authorised in this behalf."

It may be noted that the word 'agent' only appears in the explanation, it does not appear in the section proper. The old Act XIV of 1851 did not contain explanation II. It is clear therefore that explanation II was added to the section not for the purpose of restricting the section as it originally stood, but to point out that the acknowledgment mentioned in the section might not only be signed by the *person* but might also be signed by a lawfully authorised agent. I do not think that the word "personally" in explanation II of section 19 renders the construction, that ought to be given to section 19, different to the construction that ought to be given to section 20, in the case of action through agents. The word was only introduced for the purpose I have mentioned and to draw a contrast between a person acting without an agent, and a person acting through an agent.

It is contended on behalf of the defendants that a minor cannot appoint an agent, and that therefore no matter how *bona fide* and beneficial the action of their natural guardian may have been, they are not bound by her acknowledgment. A minor cannot himself appoint an agent, but the question is can there be no legally constituted agent within the meaning of the sections without appointment. Suppose Babu Lal had died leaving (as he did) a debt due to the plaintiffs and a widow and minor sons, and suppose in order to avoid a suit, the widow as guardian of the minors had regularly paid the interest as such, surely the assets of the deceased in the hands of the minors would be liable for the debt of the deceased, and the creditors could rely on the provisions of section 20, without having occasion to institute a suit, the moment Babu Lal was dead. If such a payment would bind the minors, it could only bind them, because the action of their guardian was either in the eye of law *their* action or because she was their legally authorised agent, *within the meaning of the section*. If such a payment would bind the minors, in my opinion, they are equally bound by their guardian's acknowledgment, provided it was given for their benefit. The only distinc-

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tion, in my opinion, is, that a part payment of principal or the payment of interest would perhaps more frequently be considered for the benefit of a minor than the giving of an acknowledgment. This however has nothing to do with the construction of the section. Whether a particular act was or was not for the benefit of the minor is an inference to be drawn from the facts and circumstances of each case. There would be hardly any difference between one isolated payment of interest just before the expiration of limitation, and a written acknowledgment given on a similar occasion ; and yet both might be for the benefit of the minor. It clearly appears from the judgment of their Lordships of the Privy Council in the case of *Beti Maharani v. The Collector of Etawah* <sup>(1)</sup>, that their Lordships were of opinion that the acknowledgment of the Collector acting on behalf of the Court of Wards would bind a minor, whose estate was under the management of the Court.

In such a case, it seems to me that the Collector must be regarded as the agent, appointed by law to act for the minor or (which is really the same thing) the act of the Collector must be looked upon as the act of the minor. If an act of legislature can confer such a power on the Collector, I can see no reason why the same power is not included in the wide powers vested by virtue of Hindu Law in the guardian of a minor acting for his benefit. It was held in the case of *Narendra Nath Sarkar v. Rai Charan Halder* <sup>(2)</sup>, that a certificated guardian is an agent duly authorised to pay interest on a debt within the meaning of section 20. A distinction was drawn by the learned Judges between the powers of a certificated guardian under section 20, and under section 19. That distinction cannot be drawn in the present case because Musammat Sundar Dei is not a mere certificated guardian with the limited powers of such a guardian. She is the natural Hindu guardian with the extensive power of such a guardian, and she was, in my opinion, acting for the benefit of the minors when she gave the acknowledgments.

It has been held in numerous cases that a manager of a joint Hindu family can give a binding acknowledgment even where minors are concerned. It would indeed be an inconvenient state of things if the manager of a joint Hindu family

(1) [1894] I. L. R., 17 All., 208.

(2) [1902] I. L. R., 29 Cal., 649.

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could not make a part payment of principal or a payment of interest so as to bind minor members of the family. It is urged that the position of the manager of a Hindu family is different from the position of a guardian, and he can give an acknowledgment or make a payment because of the joint nature of the family and estate. This cannot be the reason because section 21 of the Limitation Act provides that nothing in sections 19 and 20 renders one of several joint contractors, partners etc, chargeable by reason only of a written acknowledgment signed or a payment made by or by the agent of any other or others of them. If the manager of a Hindu family can be the "agent" within the meaning of the sections of a minor member of the family, I can see no reason why the natural guardian may not be the agent also. These cases and the opinion of their Lordships of the Privy Council show that there may be an agent within the meaning of the sections, who has not been actually appointed by the person liable. In the Full Bench case of *Annappa Tamman-gaunda v. Sangadigyapa* <sup>(1)</sup>, it was held that a guardian appointed under the Guardian and Wards Act could both pay interest, make a part payment or give an acknowledgment. In *Kamta Kuar v. Har Sahai* <sup>(2)</sup>, it was held that the Collector in a case under the management of the Court of Wards could give an acknowledgment. Edge, C. J., says "He (the Collector) was the person who represented the minor defendant and the estate." The natural guardian of a minor Hindu is, in my opinion, entitled by law to act on behalf of the minor in the management of his property, and the act of the guardian, if it is for the benefit of the minor, binds the estate of the latter. In the present case, the acknowledgment by Sundar Dei was for the benefit of the minors, and they are bound by it either as "their own act" or as the act of the person whom *the law* authorises to act in their behalf, that is, of their "agent duly authorised." I think in the circumstances of the present case, the acknowledgment of Musammat Sundar Dei binds the estate in the hands of the defendants as an acknowledgment within the meaning of section 20 of the Limitation Act. I would allow the appeal with costs and remand the case.

(1) [1901] I. L. R., 26 Bom., 221.

(2) [1888] A. W. N., 187



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BY THE COURT.—The opinion of the majority of the Bench being that the case should be remanded under section 562 of the Code of Civil Procedure, we allow the appeal, set aside the decree of the court below and remand the case under the provisions of that section, with directions that it be re-admitted in the file of pending suits, and be disposed of according to law. Costs here and hitherto will abide the event. The costs in this court will include fees on the higher scale.

M.L.S.

*Appeal decreed, cause remanded,*

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AIKMAN, J.

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KING EMPEROR.\*

*Code of Criminal Procedure (Act V of 1898) sections 222, 233, 234, 235, three distinct offences of criminal misappropriation and two distinct ones of forgery cannot be tried together.*

The accused was charged with having committed three separate acts of misappropriation within one year. He was also charged with having committed two separate offences of forgery. All these five offences were tried together at one and the same trial. *Held*, that the joint trial could not be supported, as the series of acts charged did not form the same transaction.

APPEAL against an order of W. R. G. Moir Esq., Additional Sessions Judge of Gorakhpur.

The material facts appear from the order of

Griffin, J.

GRIFFIN, J.—The appellant in this case has been convicted in one and the same trial on three charges of criminal misappropriation and on two charges of forgery to cover up two items said to have been embezzled. He has been sentenced in the aggregate to six years on the charges under section 409, Indian Penal Code, and to eight years under section 467, Indian Penal Code.

\*Cr. Ap. 46 of 1908.

It is contended on his behalf that the trial of the accused was bad inasmuch as there has been illegal joinder of chargers.

I am referred to the rulings in *Subrahmania Ayyar v. King Emperor* <sup>(1)</sup> *Kasi Viswanathan v. Emperor* <sup>(2)</sup> and *Manavala Chetty v. Emperor* <sup>(3)</sup>.

The point is one that does not appear to have come before this court. At least I have not been referred to any ruling bearing upon it. It is one of some importance, and, I think should be decided by a Bench of two Judges. I accordingly refer the point to a Division Bench.

The case was heard by a Bench composed of KNOX, and AIKMAN, JJ.

*M. L. Agarwala*, for the appellant.

*W. K. Porter*, (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

AIKMAN, J.—We think that the first plea taken in the petition of appeal must be sustained. The appellant was charged with three separate acts of criminal misappropriation committed within one year. He was also charged with having committed two separate offences of forgery. All these five offences were tried together at one and the same trial. The joint trial of these five offences cannot be supported by any of the provisions contained in the Code of Criminal Procedure. The series of acts charged do not form the same transaction.

We therefore set aside the conviction and order new trials on charges framed in accordance with law. The three acts of criminal misappropriation may form the subject of one trial. Evidence of the forgeries may be given in support of the charges of misappropriation. If it is decided to try the accused for the forgeries that must form the subject of a separate trial.

*Conviction set aside, new trials ordered.*

(1) [1901] I. L. R., 25 Mad., 61.

(2) [1907] I. L. R., 30 Mad., 328. (3) [1906] I. L. R., 29 Mad., 569.

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MATA PRASAD  
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KING EMPEROR.

Griffin, J.

Aikman, J.

## AHMAD ALI KHAN AND OTHERS

*versus*

## BILAS RAI AND OTHERS.\*

CIVIL

1908.

*April, 22.*

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

*Sub-mortgagee—Right to sell mortgaged property—Frame of suit.*

In a properly constituted suit a sub-mortgagee is entitled to a decree for the sale of the mortgaged property. The mortgagor in such a suit must be impleaded as also the mortgagees, so that the former may have an opportunity of redeeming and the latter may be able to safe-guard their interests in regard to the claim put forward by the sub-mortgagee, and see that the amount claimed is due.

SECOND APPEAL against the decree of Pandit Pitambar Joshi, Additional Subordinate Judge of Aligarh, reversing a decree of Babu Banke Behari Lal, Munsif of Havali.

Suit for sale upon a mortgage.

The facts appear from the judgment.

The court below decreed the claim.

Defendant appealed.

*Abdul Raoof*, for the appellant.

*B. E. O'Connor* (with him *J. N. Chaudri*), for the respondents.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The facts of this case are these. One Lachmi Narain held a mortgage of certain property and on foot of that mortgage obtained a decree for sale and thereafter sold his interest in the decree and in the mortgaged property to Bhawani Das. Bhawani Das then executed a sub-mortgage of the property in favour of the plaintiffs, in the mortgage, hypothecating the decree obtained by Lachmi Narain as also his mortgagee rights in the property. The plaintiffs, under this document, became sub-mortgagees. They instituted the suit out of which this appeal has arisen for sale of the mortgaged property, impleading as defendants not merely Bhawani Das but also the mortgagors. It appears that in execution of the decree of Bhawani Das the property was sold and purchased by Bhawani Das and that sale was confirmed but no certificate of sale has been issued. The lower appellate court decreed the plaintiffs' claim and hence the present appeal has been preferred.

The point raised before us is that the plaintiffs as sub-mortgagees are not entitled to sell the mortgaged property but can at the utmost sell the mortgagee rights, acquired by

\* S. A. 547 of 1907.

them. We are of opinion that in a properly constituted suit, a sub-mortgagee is entitled to a decree for sale of the mortgaged property. The mortgagor in such a suit must be impleaded as also the mortgagees so that the former may have an opportunity of redeeming and the latter may be able to safe-guard their interests in regard to the claim put forward by the sub-mortgagee, and see that the amount claimed is due. We dismiss the appeal with costs including fees in this court on the higher scale.

*Appeal decreed.*

BEHARI AND OTHERS

*versus*

RISAL AND OTHERS.\*

*Execution of decree—Decree as originally framed incapable of execution—Amendment of decree—Limitation Act (XV of 1877), Sch. II Arts. 178, 179.*

A decree for sale was obtained on foot of a mortgage. The decree was made absolute on 3rd February, 1903. By mistake of the Court or its officers, the decree ordered the sale of a village which did not in fact exist. The decree-holders applied for correction of the decree, and on 14th November, 1903, the correct name was substituted. Within three years from that date but upwards of three years from that of the order absolute, the decree-holders applied for execution of the decree. *Held*, that the application was within time. A decree ordering sale of a non-existent village is incapable of execution, as it would be impossible to comply with the provisions of the law as to making and affixing proclamation on the property. *Muhammad Suleman Khan v. Muhammad Yar Khan*, 1. L. R., 17 All., 39, relied upon.

SECOND APPEAL against the order of Louis Stuart Esq., District Judge of Meerut, reversing the order of H. David Esq., Subordinate Judge.

Application for execution of decree.

The material facts appear from the judgment.

The court of first instance allowed the application but the lower appellate court reversed the decree.

Decree-holders appealed.

*M. L. Agarwala*, for the appellants.

*J. N. Mukerji*, for the respondents.

The judgment of the Court was delivered by

\* E. S. A. No. 860 of 1907.

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AHMAD ALI KHAN

*v.*

BILAS RAI.

*Stanley, C. J.*

CIVIL.

1908.

*April, 2.*

AIKMAN, J.

KARAMAT

HUSAIN, J.

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*Aikman, J.*

AIKMAN, J.—The appellants obtained a decree for sale upon a mortgage. This decree was made absolute on the 3rd of February, 1903. By some mistake of the court or of its officers, the decree ordered the sale of a village, *vis.*, Chhajjupur. It is admitted that no such village exists. Discovering the mistake, the decree-holder applied for correction of the decree, and on the 14th of November, 1903, the correct name of the village, which had been mortgaged by the respondents, was substituted both in the decree under section 88, and the order absolute under section 89. Within three years from the date upon which this correction was made but upwards of three years from the date of the order absolute, the decree-holders applied for execution. They were met by a plea of limitation, which was overruled by the court of first instance, but sustained by the learned District Judge. The decree-holders come here in second appeal. The learned District Judge was of opinion that the decision, relied on by the decree-holders, namely, *Muhammad Suleman Khan v. Muhammad Yar Khan* <sup>(1)</sup>, was inapplicable to the facts of the present case, inasmuch as in that case the decree was held incapable of execution, whilst in this case the learned District Judge was of opinion that the decree was capable of execution. This view we find ourselves unable to accept. We are of opinion that a decree, which orders the sale of a share in a non-existent village, can not be executed. It would be impossible, for instance, to comply with the provisions of law as to making and affixing proclamation on the property. The appellants applied for execution within three years of the time, when a decree capable of execution came into existence. We are of opinion that the case relied on by them supports their contention. We accordingly allow the appeal, and setting aside the order of the court below, restore that of the court of first instance. The appellants will have their costs here and in the court below. The case will go back through the lower appellate court to the court of the Subordinate Judge with directions to re-admit the application under its original number in the register and dispose of it according to law.

*Appeal allowed.*

(1) [1894] 1. L. R., 17 All., 39.

## MUMTAZ-UN-NISA AND ANOTHER

*versus*

## TUFAIL AHMAD AND ANOTHER.\*

*Code of Civil Procedure (Act XIV of 1882), section 623—Review—  
Inaccurate expression in judgment—Mistake corrected.*

CIVIL.

1908.

April, 3.

BANERJI, J.  
RICHARDS, J.

The judgment of the High Court contained the following sentence:—"This under the Mahomedan Law would be what is known as an *ariat*, and therefore invalid." An application for review was presented contending that an *ariat* was valid and the expressions in italics were wrong.

*Held*, that an *ariat* was valid under the Mahomedan Law, and it was not meant to decide otherwise in the judgment. The expressions "and therefore invalid" were incorrect and were ordered to be expunged.

*Per* BANERJI, J.—Strictly speaking this application for review of judgment is not maintainable under section 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case.

APPLICATION to review the judgment of BANERJI, and RICHARDS, JJ.

The facts are to be found reported at p. 264 of I. L. R., 28 All.

*R. Malcomson*, for the applicants.

*Muhammad Ishaq*, for the opposite party.

The following judgments were delivered.

BANERJI, J.—This is an application for review of the judgment passed by us in this case, on 16th November, 1905. In that judgment which is reported in I. L. R., 28 All., p. 264, the following passage occurs. "It is manifest that the intention" was to transfer to the lady "the right to enjoy the usufruct of the property for her life. This under the Mahomedan Law would be what is known as an *ariat* and therefore invalid." It is said that we were wrong in saying in our judgment that an *ariat* is invalid and we are asked to expunge the word "invalid" and substitute

*Banerji, J.*

\* Application for review of judgment F. A. F. O. in No. 80 of 1905.

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*Banerji, J.*

for it the word "valid." Strictly speaking this application for review of judgment is not maintainable under section 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case, but as the expression "therefore invalid may lead persons to think that in our opinion a grant known as an *ariat* in Mahomedan Law is invalid, we think the matter should be considered by us. Speaking for myself I think the word "invalid" erroneously crept into the judgment. What we meant to hold and did hold was that the transfer was not an absolute gift, so that any limitation or condition limiting it would be void under the Mahomedan Law, but that taking the transaction as a whole it was a grant of the usufruct of the property to Musammat Habib-un-nissa for her life. This is what is known in Mahomedan Law as an *ariat*. *Vide* Amir Ali Mahomedan Law, p. 79. An *ariat* is not invalid according to Mahomedan Law, and we did not mean to hold that the transfer in the present case being an *ariat* was invalid, all that we intended to decide was that it was not an absolute gift but was what is known to Mahomedan Law as an *ariat*. In order to remove all misconception, I think the words "therefore invalid" should be expunged from the judgment, and I would order accordingly.

*Richards, J.*

RICHARDS, J.—I also think that an inaccurate expression has crept into the judgment. The suit was brought to recover possession of certain property. The plaintiffs claimed as the heirs of Niaz Ali. The defendant defended the suit as transferee of Musammat Habib-un-nissa wife of Niaz Ali. Niaz Ali had made an application in the revenue court for mutation of names in favour of Musammat Habib-un-nissa. The defendant claimed that the result of that application in the revenue court was to confer an absolute estate on Musammat Habib-un-nissa, at least this was the only contention in the appeal before us. We had therefore to decide only the question whether Musammat Habib-un-nissa had acquired an absolute estate. We decided the transactions amounted to no more than a grant of an *ariat* to Musammat Habib-un-nissa and that accordingly the defendant could not rely on a transfer from Musammat Habib-un-nissa as a complete transfer of the entire estate in the property. We intended to decide that question and no other and if the judgment is corrected in the way pointed out

by my learned brother it will be free from all ambiguity. I then concur in the order passed by him.

BY COURT.—We allow the application so far that we direct that the words “and therefore invalid” be expunged from the judgment. Having regard to the circumstances of the case we make no order as to costs.

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*Application granted.*

DWARKA DAS AND ANOTHER

*versus*

AKHAY SINGH.\*

CIVIL.

1908.

*May, 25.*

*Code of Civil Procedure (Act XIV of 1882), section 13—Res judicata—Question of title decided in former suit by revenue court—Former suit instituted wrongly in revenue court—Appeal to the Civil Court—Suit to be deemed as instituted in right court.*

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

In a suit for an annuity for certain years, the defendants denied the title of the plaintiffs. In a previous suit in the revenue court between the same parties for arrears of revenue of certain other years it was decided, upon the admission of the defendant, that he was liable.

*Held*, that the decision of the revenue court operated as *res judicata* upon the question of title and the defendant was estopped from re-opening the question in the present suit and the plaintiffs were entitled to receive the amount of the annuity.

SECOND APPEAL against the decree of Babu Shiva Prasad, Additional Subordinate Judge of Agra, confirming a decree of Babu Baidya Nath Das, Munsif.

Suit to recover an annuity.

The facts were as follows :—

In 1862 there was a litigation between one William Derridon and his two sisters Rosina and Teressa. This was settled by a compromise. The compromise decree provided that the two ladies were to receive an annuity for their life, that after their death it was to devolve on their issue; that the ladies and their heirs had no right to transfer the annuity charge; that the annuity charge was to revert to Major Derridon and his

\* S. A. 88 of 1907.



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heirs on the death of two ladies if they died without issue. The annuity was to be a charge on  $7\frac{1}{2}$  biswas *muafi* in the village Anwal Khera. The ladies died without issue, and the annuity reverted to George Derridon a nephew of William and he became the absolute owner of the charge. The father of the plaintiffs purchased half the share in the charge from George Derridon and he acquired the right to realize the charge from  $7\frac{1}{2}$  biswas *muafi*.

William Derridon had transferred 1 biswa and 16 biswansis out of  $7\frac{1}{2}$  biswas to the father of the plaintiffs and the remaining 5 biswas and 14 biswansis *muafi* were purchased by auction sale by the defendants, 2nd set. The plaintiffs' father thus became the owner of the charge on  $7\frac{1}{2}$  biswansis *muafi* and of 1 biswa and 16 biswansis *muafi* itself. He transferred the said full and absolute *muafi* to the defendants, 1st set.

The plaintiffs brought a suit for recovery of their share of the charge against the defendant Raja Akhay Singh in 1897. The suit was decreed on the admission of the defendant. The plaintiffs brought this suit for recovery of their share of annuity for subsequent years. The suit was dismissed by the courts below on the ground that the right of Rosina Smith and Teresa Rennick was not transferable.

Plaintiffs appealed.

*A. E. Ryves* (with him *Satish Chandra Banerji*), for the appellants. The defendant was barred by section 13, Code of Civil Procedure, by reason of a previous decision of the High Court decreeing the appellants' suit for arrears of revenue for the years 1306 to 1308 Fasli. The title in question in the present suit was the same as that in the previous suit; section 13 barred the defence.

*Durga Charan Banerji*, for the respondent.

The present suit was to recover *malikana* for the years 1309 to 1311 Fasli, whereas the previous suit was one for arrears of revenue. The former suit was decided on an admission and the question of title was not decided.

*Balkishan v. Kishan Lal* [1888] I. L. R., 11 All., 148.

*Nicholas v. Ashhar* [1896] I. L. R., 24 Cal., 216.

The former suit was brought in the revenue court, and the decree could not operate as *res judicata* in a Civil Court.

*Rani Kishori v. Raja Ram*, [1903] I. L. R., 26 All., 468.

*Ashrafunnissa v. Ali Ahmad*, [1904] I. L. R., 26 All., 601.

*Inayat Ali Khan v. Ahmad Ali Khan*, [1905] I. L. R., 27 All., 569.

In order to determine the question of *res judicata*, the jurisdiction of the court in which the suit was instituted must be looked to.

*Shebu Raut v. Behari Raut* [1908] 7 C. L. J., 470.

*Hurry Behari Bhagat v. Pargun Ahir* [1890] I. L. R., 19 Cal., 656.

*Bakshi v. Nizamuddi* [1892] I. L. R., 20 Cal., 505.

The following judgments were delivered.

KARAMAT HUSAIN, J.—The facts which have given rise to this appeal are as follows :—

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Husain, J.

The plaintiffs brought a suit for their share amounting to Rs 151-8-0 in an annuity which was a charge on a 7½ biswa share in the village Anwalkhera for the years 1309, 1310 and 1311 Faslī. The defendants resisted the claim on various grounds. The learned Munsif dismissed the suit. He held that the judgment of this Court, dated the 14th August, 1905, did not operate as *res judicata*, inasmuch as the subject-matter in issue in the case in which that judgment was pronounced was not the same as in the present case. He remarks "I do not think (that) that judgment can operate as *res judicata* the subject-matter being different, *viz.*, for a different year's charge."

The plaintiffs appealed to the District Judge. Their fifth ground of appeal was that "the question of the liability of the defendant No : 3 to pay the plaintiffs is *res judicata*."

The learned District Judge dismissed the appeal on the ground that the defendant No : 1 was not liable to pay the annuity deciding the plea of *res judicata*. I may mention here that the former suit was instituted in the Revenue Court and that no objection was taken that the suit was instituted in the wrong court. The learned District Judge, under the provisions of section 206 of the North-Western Provinces Rent Act (Act No. 12 of 1881), disposed of the appeal as if the suit had been instituted in the right court. He remarked

"It is a mere quibble to say that (the) defendant admitted it as a share of revenue and not as a share of an annuity. The

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fact remains that Raja Govind Singh admitted his liability to pay it and offered to pay it. Now that the case has come to this Court, it is immaterial whether the suit was originally instituted in the civil court or the revenue court. The only objection that Raja Govind Singh's pleader can now raise as to paying it is that if the suit was brought in the civil court for the money as an annuity, his client might be able to raise some defence. But the facts have been before him for a long time, and if there is any reason why he should not pay the money, he should be able to state it in this Court. On the state of things at present disclosed the appellants are clearly entitled to receive the money."

The plaintiffs have preferred a second appeal to this Court. It is contended on their behalf that the question of the liability of the defendant to pay Rs 151-8-0 to the plaintiffs is *res judicata* by reason of the judgment of the High Court between the same parties, dated the 14th August, 1905, in second appeal No: 872 of 1903, and that the fact that the claim in the former litigation was for a different set of years can not prevent the operation of *res judicata*, for, the title under which the plaintiffs claimed the share of the annuity whether for one set of years or another was one and the same title in both cases.

To meet this contention, it is argued for the respondent (1) that the claim in the former suit was for 1306, 7 and 8 Fasli while in the present suit it was for 1309—11 Fasli, and thus the subject-matter was not identical in both suits; (2) that the question of title was not determined in the former litigation; (3) that the former suit was instituted in the Revenue Court while the present suit was brought in the Civil Court; (4) that the decision of the question of liability by the Revenue Court could not operate as *res judicata* in the present suit which was brought in the Civil Court, and in which the question of liability to pay the share of the annuity was in issue. (See *Rani Kishori v. Raja Ram* (1), *Ashrafunnisa v. Ali Ahmad* (2), and *Inayat Ali Khan v. Ahmad Ali Khan* (3), and (5) that the ultimate decision of the appeal in the former suit by the High Court was immaterial, inasmuch as for the operation of the

(1) [1903] I. L. R., 26 All., 468. (2) [1904] I. L. R., 26 All., 601.

(3) [1905] I. L. R., 27 All., 569.

plea of *res judicata* the competency of the original court which decided the former suit must be looked to and not that of the appellate court in which the suit was ultimately decided on appeal (see *Shebu Raut v. Behari Raut*) (4).

In order to see whether the question of title was raised in the former litigation, I examined the paper book of S.A. No. 872 of 1903, with the following result :—

The plaintiffs in their plaint alleged that “the plaintiffs’ share amounted to Rs. 214-14-11 per annum.” The defendants in their written statement admitted that “according to the village practice, the plaintiffs had always been getting Rs. 151-8 per annum on account of the revenue of their share.” They further added that the defendants always offered to pay Rs. 151-8-0, and that that sum might be awarded to the plaintiffs. The issue ran as follows :—whether the annual amount of revenue was Rs. 214-14-11, as claimed by the plaintiffs, or Rs. 151-8-0, as alleged by the defendants.

The first court dismissed the claim considering it a claim for revenue. The plaintiffs appealed to the learned District Judge who decreed the appeal. His remarks are:—

“Now as to whether the appellants are entitled to the amount admitted in the written statement, the pleader for Raja Govind Singh contends that the written statement was a piece of foolishness on the part of the defendant’s Karinda, that the defendant never admitted that the plaintiff was entitled to a share of an annuity, and that the admission gives the plaintiff no title. Now formal pleas in a written statement can not be evaded by saying that they were foolishly made by an agent. The defendant admitted that the plaintiff was entitled to receive from him annually Rs. 151-8-0, out of the assigned revenue of the share in question.

Although that amount has been fixed by the decision of the Court, and cannot fluctuate according to fluctuation in the revenue of the share, yet plaintiff’s title is undoubtedly based on the fact that his predecessors-in-title had a share in the estate. The sum in question has always hitherto been dealt with by the Revenue Court, and it is a mere quibble to say that defendant admitted it as a share of revenue and

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(4) [1908] 7 C. L. J. R., 470.

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not as a share of an annuity. The fact remains that Govind Singh admitted his liability to pay it and offered to pay it."

The defendants, Raja Govind Singh and Kuar Akhay Singh appealed to this Court, and a Bench of this Court, of which one of us was a member dismissed, the appeal, on the 14th of August, 1905, with the following remarks:—"It is clear on the findings that this appeal cannot be supported. The defendant appellant admitted his liability to pay Rs. 151-8-0. The District Judge gave a decree in accordance with that admission, and so acted within his right."

The above passages leave no doubt in my mind that in the previous litigation, the question of title was involved, and the liability of the defendant No. I to pay Rs. 151-8-0, a year to the plaintiffs was decided on his own admission. Such being the case, the judgment of this Court dated the 14th August, 1905, undoubtedly operates as *res judicata*, notwithstanding the fact that the claim in the present litigation is for a different set of years.

*Chandi Prasad v. Maharaja Mohendra Chandra Singh* <sup>(1)</sup> is an authority for the above proposition. The root of the matter between the parties whether it related to 1306, 1307 and 1308 Fasli or to 1309, 1310 and 1311 Fasli was in both cases the same and the liability of the defendant to pay to the plaintiffs the share of the annuity amounting to Rs. 151-8-0 was decided in the former suit.

It is, however, argued for the respondent that the original court which determined the question of the liability of the defendant to pay Rs. 151-8-0 annually was the revenue court and its decision cannot operate as *res judicata* in the present suit instituted in the Civil Court.

There is no force in the argument. The former suit was no doubt instituted in the Revenue Court which was the wrong court, but no objection was taken to such institution and the learned District Judge proceeded under section 206 of the North Western Provinces Rent Act, which runs as follows:—

"In all suits instituted in any Civil or Revenue Court in which an appeal lies to the District Judge or High Court, an

(1) [1901] I. L. R., 24 All., 112.

objection that the suit was instituted in the wrong court shall not be entertained by the appellate court, unless such objection was taken in the court of first instance, but the appellate court shall dispose of the appeal as if the suit had been instituted in the right court."

He disposed of the appeal as if the suit had been instituted in the right court. Under such circumstances, the Revenue Court must be deemed to be the Civil Court, and the decision of the Revenue Court on the question of title must be held to be the decision of the Civil Court. Apart from the provisions of section 206 of the N.-W. P. Rent Act (12 of 1881), whenever a Revenue Court has the power of directly deciding a question of title that court for deciding that question must on principle be deemed to be a Civil Court. The determination of the question of title is the function of a Civil Court, and if the Legislature invests a Revenue Court with the power of directly deciding the question of title in certain cases, the Revenue Court in those cases becomes a Civil Court. The case of *Salig Dube v. Deoki Dube*, (1) (which lays down that when a Revenue Court, under section 199 of the Agra Tenancy Act, decides a question of title against a tenant that tenant is barred by the rule of *res judicata* from reopening the question of title in a Civil Court) is I think based on that principle.

The cases of *Rani Kishori v. Raja Ram* (2), *Ashraf-un-nisa v. Ali Ahmad* (3) and *Inayat Ali Khan v. Ahmad Ali Khan* (4) have no application to the facts of the present case. In those cases the Revenue Court, under section 206 of the N.-W. P. Rent Act (12 of 1881) was not transformed into a Civil Court nor was it invested with the power of directly deciding the question of title. Moreover the question of title was not directly in issue in the Revenue Court in these cases. Regarding the case of *Shebu Raut v. Behari Raut*, it is sufficient to remark that it lays down a correct rule of law but has no application to the case before us, in which the original court of Revenue, by the provisions of section 206 of the old Rent Act, is deemed to be a Civil Court.

(1) [1905] 2 A. L. J. R., 337.

(2) [1905] I. L. R., 26 A. 468 1903.

(3) [1904] I. L. R., 26 A. 601.

(4) [1905] I. L. R., 27 A. 569.

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For the above reason, I would hold that the judgment of this Court, dated the 14th August, 1905, in S. A. No. 872 of 1903, operates as *res judicata*, and would allow the appeal, and set aside the decrees of the courts below, and decree the plaintiff's claim, with costs which in this Court will include the fees on the higher scale.

Stanley, C. J.

STANLEY, C. J.—I concur in the proposed order.

BY THE COURT. The order of the Court is that this appeal be allowed, the decrees of the courts below be set aside, and the plaintiffs claim be decreed with costs which in this Court will include fees on the higher scale.

S. C. C.

*Appeal decreed.*

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May, 8.

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

RAM LAL

*versus*

BAHADUR ALI AND ANOTHER.\*

*Pre-emption—Wajib-ul-arz—Construction—Rights of holders of khalsa and milk.*

The *wajib-ul-arz* of a village provided as follows :—The zamindar of the *khalsa* is one person, hence there is no custom of pre-emption in the *khalsa* but among the owners of the *khalsa* and the *milk*, the following custom of pre-emption prevails. *Held*, that under the condition of the *wajib-ul-arz* set out above, the *khalsa* land was not subject to a claim of pre-emption but that the Mahomedan Law of pre-emption applied, and the fact that the property was purchased by a Hindu made no difference. *Gobind Dayal v. Inayat-ullah*, I. L. R., 7 All., 775. *Qurban Husain v. Chote Lal*, I. L. R., 22 All., 102; *Amir Hasan v. Rahim Baksh*, I. L. R., 19 All., 466, referred to.

SECOND APPEAL against the decree of D. R. Lyle Esq., District Judge of Moradabad, modifying the decree of Pandit Mohan Lal, Officiating Subordinate Judge.

Suit for pre-emption.

The facts appear from the judgment.

The Court of First Instance decreed the claim in part but the lower appellate court decreed the whole suit.

Defendant appealed.

\* S. A. No. 1216 of 1906.

*G. W. Dillon*, for the appellant.

*Abdul Raoof*, for the respondents.

The following judgments were given :—

KARAMAT HUSAIN, J.—The facts out of which this second appeal has arisen are as follows :—

One Ismail Khan, on the 9th of December, 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan brought a suit for pre-emption under the Mahomedan Law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance finding that the vendee Ram Lal was entitled to pre-empt under the *wajib-ul-arz*, and that Bahadur Ali was entitled to pre-empt under the Mahomedan Law gave the latter a decree for half the property in suit, on payment of half the price for which it had been sold. Both parties appealed. The learned District Judge coming to the conclusion that the custom of pre-emption recorded in the *wajib-ul-arz* superseded the rules of the Mahomedan Law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit, and dismissed the appeal of Ram Lal. Ram Lal has preferred this second appeal. The grounds of appeal are :—

- (1) The interpretation put upon the *wajib-ul-arz* is wrong.
- (2) The words in the *wajib-ul-arz* relate to propinquity in space and not to propinquity of relationship.
- (3) The claim being based on the Mahomedan Law, a decree under the *wajib-ul-arz* could not be passed.

The following facts have been found by the lower appellate Court :—(1) Bahadur Ali is a co-sharer in the *khalsa* ; (2) Ram Lal is also a co-sharer in the *khalsa*. The point on which the decision of this appeal turns is the interpretation of the *wajib-ul-arz*. The material portion of it may be rendered as follows :—

“ The zamindar of the *khalsa* is one person ; hence there is no custom of pre-emption in the *khalsa* ; but among the owners (lit. owner) of the *khalsa* and *milks*, the following custom of pre-emption obtains.”

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Husain, J.*



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1908.

RAM LAL  
v.

BAHADUR ALI.

*Karamat  
Husain, J.*

On the basis of the above extract from the *wajib-ul-arz*, it is urged for the appellant that the *wajib-ul-arz* gives no right of pre-emption to the co-sharers in the *khalsa inter se*, but that there is a right of pre-emption between the owners of the *khalsa* and the owners of the *milks* in the sense that if a share in the *khalsa* is sold, the owner of the *milk* is entitled to pre-empt. Whatever may be the correct meaning of the last portion of the peculiarly worded clause in the *wajib-ul-arz*, I can safely say that, according to the plain meaning of the first part of the clause, the *khalsa* land is not subject to a claim for pre-emption under the *wajib-ul-arz*. Such being the case, the *wajib-ul-arz* has no application to the sale of the *khalsa* land, and a suit to pre-empt it can only be instituted under the Mahomedan Law.

This leads me to determine the right of the pre-emptor and the vendee under the Hanafi school of Mahomedan Law. The property sold belonged to a Mahomedan, and was therefore subject to pre-emption by those who were entitled to pre-empt under that law. The fact that it was purchased by a Hindu makes no difference. He purchased it subject to the right of pre-emption by the plaintiff. (See *Gobind Dayal v. Inayat-ul-lah* <sup>(1)</sup>).

It might, however, be contended that Ram Lal being a Hindu has no right to pre-empt, although he is a co-sharer in the *khalsa*, but there is no force in this contention. "The principle of reciprocity," as remarked by Aikman, J., in *Qurban Husain v. Chote Lal* <sup>(2)</sup> "lies at the root of the law of pre-emption" and "according to the Hanafi law it is not necessary that the pre-emptor should be of the same religion as the vendor."

The conclusions at which I thus arrive are that :—

(1) The *khalsa* land in Bazidpur is not subject to the right of pre-emption under the *wajib-ul-arz*.

(2) The case before us is to be governed by Hanafi law.

(3) Bahadur Ali and Ram Lal both have equal rights of pre-emption in respect of the *khalsa* land.

Following therefore *Amir Husan v. Rahim Baksh* <sup>(3)</sup>, I set aside the decree of the lower appellate court, and give Baha-

(1) [1885] I. L. R., 7 All., 775. (2) [1899] I. L. R., 22 All., 102, at p. 104.

(3) [1897] I. L. R., 19 All., 466.

dur Ali a decree for possession of half of the property in dispute, on condition that the plaintiff shall deposit in court within two months hence the sum of Rs. 734, which is half the purchase money. Ram Lal defendant will pay the costs incurred by the plaintiff in all courts : on default, his suit shall stand dismissed with costs in all courts.

STANLEY, C. J.—I concur in the views expressed by my learned brother. The wajib-ul-arz which we have to interpret has most novel provision as to pre-emption, and it is difficult to say what was in the minds of the parties when they agreed to be bound by it. But upon the whole I am disposed to think that the view which has been adopted by my learned colleague is correct. I therefore concur in the proposed order.

BY THE COURT.—The order of the Court is that the decree of the lower appellate court be set aside, and that a decree for possession of half of the property in dispute be passed in favour of Bahadur Ali, on the condition that he deposit in Court within two months from this date a sum of Rs. 734. We give Bahadur Ali the costs of this appeal in all courts in the event of the payment of the said sum within the time aforesaid. In default of payment, his suit will stand dismissed with costs in all courts.

*Appeal decreed.*

RAM RATAN  
*versus*  
LACHMAN DAS.\*

*Hindu Law—mortgage by uncle—for personal benefit.*

Appellant held a decree against his uncle Gendan and got him arrested in execution. Gendan Lal in order to pay him executed a mortgage bond hypothecating a joint family property to the respondent. The joint family consisted of himself and appellant. The creditor sued appellant who pleaded that his uncle could not hypothecate joint family property to pay up a decree which he (appellant) held against him.

*Held* (STANLEY C. J. AND BANERJI J.), that appellant's plea must prevail.

Distinction between powers of a manager who is a father and a manager who is not a father pointed out.

\* S. A. No. 710 of 1907.

CIVIL.  
1908.  
RAM LAL  
v.  
BAHADUR ALI.

*Stanley, C. J.*

CIVIL.  
1908.  
May, 14,  
*Stanley, C. J.*  
*Banerji, J.*

CIVIL  
1908.

RAM RATAN  
v.  
LACHMAN DAS.

SECOND APPEAL against the decree of W. F. Kirtori Esq., Additional Judge of Moradabad, confirming the decree of Khwaja Abdul Ali, Munsif of Moradabad.

Suit for sale.

The material facts appear from the judgment.

*Tej Bahadur Sapru* (with him *Gokul Prasad*), for the appellant.

*Durga Charan Banerji*, for the respondent.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—This was a suit on a mortgage bond of the 31st of August, 1902, executed by one Gendan Lal, who is said to have been the manager of a joint Hindu family, of which Ram Ratan, his nephew, and several others were members. It appears that Ram Ratan brought a suit against his uncle, Gendan Lal, and obtained a decree, and in order to provide money for the satisfaction of this decree in connection with which Gendan Lal was imprisoned, Gendan Lal purporting to act as manager of the joint family executed the mortgage in suit. The court of first instance decreed the plaintiff's claim, and this decree was affirmed by the lower appellate court. Ram Ratan now appeals to this Court, and his case is that he, though a member of the joint family at the time when the bond was executed, was in no way liable to pay Gendan Lal's debt, which was owing to himself, and that his share in the joint family property is not liable to be sold in execution of a decree on the mortgage. The learned Additional Judge in his judgment was of opinion that the raising of the loan by Gendan Lal was a matter of necessity, and that in view of the decision in *Dulip Singh v. Sri Kishun Pande* <sup>(1)</sup>, the plaintiff was entitled to maintain his decree. That case decided that ancestral property may be sold by a father to effect his release from prison. Now there is no doubt that Hindu sons are liable for their father's debts and that the sons in such a case are bound to satisfy the debts and, if necessary by payment of the father's debts, release him from custody. But this is an entirely different case. The appellant Ram Ratan was under no liability to pay Gendan Lal's debt—a debt which as we

(1) [1872] N.-W. P., H. C. R., 83.

have said, was due to himself. Therefore there is no analogy between this case and the case on which the learned Additional Judge rested his decision. We think that his decision is wrong and that the appeal must be allowed so far as Ram Ratan is concerned. The other defendants to the suit have not resisted the decree, and therefore it will hold good as to them. As regards Ram Ratan the suit must be dismissed as against him. We accordingly allow the appeal. We set aside the decree passed against Ram Ratan, and dismiss it as against him and as against his share of the mortgaged property, with costs in all courts including fees in this Court on the higher scale.

*Appeal allowed.*

## KING EMPEROR

*versus*

## BADRI PRASAD.\*

*Code of Criminal Procedure, (Act V of 1898) section 498—Bail in non-bailable offences—Discretion—exercised by the Judge.*

Section 498 of the Code of Criminal Procedure, gives the Court of Sessions and High Court very wide powers to admit an accused to bail even when he is charged with a non-bailable offence. The admission to bail is a matter within the discretion of the Sessions Judge. In this case the Judge having exercised his discretion with proper care, the High Court refused to interfere.

APPLICATION to revise an order of C. Rustomjee Esq., Sessions Judge of Allahabad.

The facts appear from the judgment.

*W. K. Porter*, (Assistant Government Advocate) for the Crown.

*B. E. O'Connor* (with him *E. A. Howard*, *G. P. Boys*, *Moti Lal Nehru*, and *Durga Charan Banerji*), for the accused.

The following judgment was delivered by

AIKMAN, J.—On the 9th of this month, one Badri Prasad was arrested on a charge of abetment of the murder of two women. The inquiry into the case was made by the Joint Magistrate of Allahabad, who, on the 22nd instant, committed Badri Prasad, for trial by the Court of Session on a charge of

\* Criminal Revision No. 264 of 1908.

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1908.

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vs.  
LACHMAN DAS.

*Stanley, C. J.*

CRIMINAL.

1908.

*May, 30.*

AIKMAN, J.

*Aikman, J.*

CIVIL.

1908.

KING EMPEROR

v.

BADRI PRASAD.

*Aikman, J.*

abetment of murder. On the 23rd instant, an application was presented to the learned Sessions Judge by the accused's Counsel asking, for the reasons set out in the application, that the accused might be admitted to bail. The learned Judge gave notice of this application to the Government Pleader, and gave him time to take instructions from the District Magistrate. On the 25th instant, the learned Judge after hearing the Counsel for the accused in support of the application, and the Government Pleader on behalf of the Crown, and after considering the record of the inquiry, granted the application, and admitted the accused to bail on his own bond and on heavy sureties. The accused, I am informed, was released on furnishing the required bond and sureties. On the 26th instant, an application was presented to this Court by the learned Government Advocate, on behalf of the District Superintendent of Police, asking that this Court should set aside the order of the learned Judge, directing Badri Prasad's release on bail, pending the decision of the trial in the Court of Session. A rule was issued by a learned Judge of this Court calling on Badri Prasad to show cause why the order of the learned Sessions Judge should not be set aside, I have today heard the learned counsel for Badri Prasad, who appeared to show cause against the rule, and the learned Assistant Government Advocate, who appeared in support of it. It is not contended that the order of the learned Sessions Judge was passed without jurisdiction. Section 498 of the Code of Criminal Procedure gives this Court and the Court of Session very wide powers to admit to bail, even where an accused person has been convicted and has not appealed. In this case, the offence with which the accused is charged is, it is true, a non-bailable offence, but even in such a case it is clear from the section quoted that the accused may be admitted to bail. The admission to bail was a matter within the discretion of the learned Sessions Judge, and I have heard nothing to satisfy me that the learned Sessions Judge exercised his discretion without proper care. I accordingly discharge the rule.

*Rule discharged.*

JAGARDEO SINGH  
*versus*  
 PHULJHARI AND ANOTHER.\*

CIVIL.

1908.

May, 14.

STANLEY, C. J.  
BANERJI, J.

*Limitation Act (XV of 1877), article 91—Sham transaction—Suit for declaration—No prayer for setting aside the deed—Effect of on suit.*

When a plaintiff brings a suit for a declaration that a certain sale deed executed by him was a sham transaction, it is not necessary for him to sue to set it aside and article 91 of the Limitation Act has no application to such cases. *Shamlal v. Amarendro*, I. L. R., 23 Cal., 460, and *T. P. Petherpermal v. Muniandy*, 12 C. W. N., 562, followed.

SECOND APPEAL against the decree of W. R. G. Moir Esq., District Judge of Jaunpur, affirming a decree of M. Zainul-ab-din, Subordinate Judge.

Suit for compulsory registration.

The courts below dismissed the suit.

Plaintiff appealed.

The material facts appear from the judgment.

*Kalindi Prasad*, for the appellant, cited:

*Singarappa v. Tulari*, [1904] I. L. R., 28 Mad., 349.

*Meda Bibi v. Inaman Bibi*, [1884] I. L. R., 6 All., 207 F. B.

*T. P. Petherpermal v. Muniandy*, [1908] 12 C. W. N., 562.

*Shamlal v. Amarendro Nath*, [1895] I. L. R., 23 Cal., 460.

The respondents were not represented.

The judgment of the Court was delivered by

BANERJI, J.—The court below has dismissed the suit of the plaintiff appellant on the ground that it is barred by limitation, under article 91 of the second schedule to the Limitation Act. The only question for determination in this appeal is whether that article governs the suit. The plaintiff's case was that he and his nephew Ramdeo executed a sale deed of certain *samindari* property in favour of the defendant Musammat Phuljhari, on the 27th of June, 1899; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment; that a deed was drawn up and signed by

*Banerji, J.*

\* S. A. 859 of 1907.

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1908.

JAGARDEO SINGH

v.

PHULJHARI.

*Banerji, J.*

her, but she refused to have it registered, and that an application for the registration of the deed, made by the plaintiff to the District Registrar, was refused. The plaintiff, accordingly brought the present suit for a decree directing the registration of the deed of relinquishment. This part of the claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June, 1899, is a fictitious transaction and without consideration. In the alternative, he prayed that if the sale transaction was held to be genuine Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The court of first instance held that the sale was a fictitious transaction and dismissed the claim. On appeal, the learned Judge came to the conclusion that the suit was time-barred, having been brought after three years from the date of its execution. This view of the learned Judge appears to us to be erroneous. The claim was not to set aside the sale deed, but for a declaration that from its very inception, it was a sham transaction. If this was so, there was no necessity for the plaintiff to have the deed set aside, and therefore article 91 of the second schedule to the Limitation Act had no application. This was so held by the Calcutta High Court in *Sham Lall Mitra v. Amarendra Nath Bose* <sup>(1)</sup>. We may also refer to the recent ruling of their Lordships of the Privy Council in the case of *T. P. Petherpermal Chetty v. R. Muniandy Servai* <sup>(2)</sup>. If article 91 was applicable, the learned Judge should also have determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. This he has not done. As the suit was dismissed on a preliminary ground, and in our opinion, that ground is untenable, we allow the appeal, set aside the decree of the court below, and remand the case to that court under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register, and dispose of it according to law on the merits. The appellant will have his costs of this appeal. Other costs will follow the event.

*Appeal decreed.*

(1) [1895] I. L. R., 23 Cal., 460.

(2) [1905] 12 C. W. N., 562.

RAM ANANT SINGH AND ANOTHER

*versus*

SHANKAR SINGH.\*

CIVIL.

1908.

May, 8.

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.*Concurrent lease—Rights of lessee—Assignment of Landlord's rights—Suit for rent against second lessee—maintainable—first lease not expired.*

The plaintiffs executed a lease of certain property in favour of *R*, and before the expiry of the term of that lease, another lease in favour of *S* who was authorised to recover the rent reserved under the previous lease from *R*. *Held*, that the latter lease was what is known as concurrent lease and operated as an assignment of the landlord's interest during the term of the earlier lease. As assignee of landlord's rights, *S* was entitled to collect rents from the previous lessee. *Harmer v. Beon*, 3 C. and K., 307, applied.

SECOND APPEAL against the decree of Saiyid Muhammad Ali Esqr., District Judge of Mirzapur, reversing a decree of Kunwar Jagdish Prasad, Assistant Collector of the first class.

Suit for rent.

The court of first instance decreed the claim but the lower appellate court reversed the decree.

Plaintiffs appealed.

The material facts appear from the judgment.

*Durgu Charan Banerji* (with him *Haribans Sahai*), for the appellants.

*Gokul Prasad*, for the respondent.

The judgment of the Court was delivered by

STANLEY, C. J.—The facts of this case are these. The plaintiffs are the owners of a share of village called Chingouri in the District of Mirzapur. On the 16th of June, 1900, they executed a lease of this property in favour of the defendant Raghunath Singh, for a term extending from 1308 to 1314 Fasli at an annual rent of Rs. 395. Subsequently on the 12th of April, 1904, the plaintiffs executed another lease of the same property in favour of the defendant Shankar Singh, for a term extending from 1312 to 1320 Fasli, at the same rent, namely, Rs. 395. Under this lease, Shankar Singh was

\* S. A. No. 556 of 1907.

*Stanley, C. J.*



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*Stanley C. J.*

authorised to realise the rent from the defendant Raghunath Singh. This was what is known as a concurrent lease. Shankar Singh failed to pay the rent for the years 1312-1313 Fasli, and hence the suit was brought out of which this appeal has arisen. The court of first instance decreed the plaintiff's claim, but upon appeal the learned District Judge reversed the decision of the court below, and dismissed the plaintiff's suit on the ground that so long as the lease of 1900 subsists, the plaintiffs have no right to maintain a suit for rent against Shankar Singh. He says in his judgment "As Raghunath Singh's lease was not cancelled, and as he was not ejected, he remained in possession as *thekadar* in 1312 and 1313 Fasli, and Shankar Singh was not in possession in those years. I therefore do not see how Shankar Singh can be held responsible for the rent for 1312 and 1313 Fasli." In this view, the learned District Judge was in error. The lease of 1904 operated as an assignment of the landlord's interest, during the term of the earlier lease of 1900, and thereafter as a lease for the residue of the term granted by it. As assignee of the landlord Shankar Singh was entitled to collect the rent from Raghunath Singh. In the Law of Landlord and Tenant by Mr. Woodfall, we find the law thus stated :—A concurrent lease is one granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises to another person. If under seal, it operates as an assignment of part of the reversion during the continuance of such previous lease, and from henceforth as a lease in possession during the residue of the time therein expressed to be granted. It entitles the lessee as assignee of part of the reversion to the rent reserved in the previous lease, and to the benefit of the covenants therein contained, which are to be respectively paid and performed during the then residue of the term granted by the lease and the continuance of the concurrent lease." 17th Edition, 235. In support of this statement the learned author quotes the decision of a very eminent English Judge, BARON PARKE, the case of *Harmer v. Beon* ( ). The learned Baron held under very similar circumstances that the operation of a concurrent lease of the kind operated to transfer part of the reversion of

(1) 3 C. &amp; K., 307.

the landlord to the lessee and that the landlord after the execution of such concurrent lease could not recover as against the first lessee any rent due after the execution of the concurrent lease. The facts in that case were these:—the defendant rented a house from the plaintiff at a rent of £20 quarterly; afterwards the lessor granted a lease by deed to a third party of the house in question, and other property for 21 years. It was held that the landlord could not recover the rent due under the first lease after the execution of the second lease. For these reasons, we think the learned District Judge was in error, and we therefore allowing this appeal, set aside his decree and restore the decree of the court of first instance with costs in all courts, including fees in this Court on higher scale.

*Appeal decreed.*

## HARPAL SINGH AND OTHERS

*versus*

## LEKHRAJ KUNWAR.\*

*Hindu Law—Impartible estate—Previous suit compromised—effect of compromise—Interpretation.*

The widow of the last holder of an impartible estate was in possession of that estate under a will. Her husband's nephew brought a suit to contest the will and to recover possession of the impartible estate. The suit was compromised, the widow being left in possession during her life-time of the estate as *gaddinashin*, but without the power to transfer or charge the estate in any way, an annuity of Rs. 12,000 *per annum* being settled upon the nephew, and it being declared that after the death of the widow, the nephew, or any representative (*kaim mokam*) of his, who may be alive at the time, shall be the absolute owner (*malik mustaqil*) of the estate and shall occupy the *guddi*.

*Held*, upon the construction of the compromise, that the character of the estate as it had been handed down from father to son for generations was not changed, that the nephew took an absolute vested interest in the property the enjoyment of it being postponed during the life of the widow and that upon the death of the nephew the

\* F. A. No. 94 of 1906.

CIVIL.

1908.

RAM ANANT  
*v.*

SHANKAR SINGH.

*Stanley, C. J.*

CIVIL.

1908

May, 11, 12, 13, 29

STANLEY, C. J.  
BANERJI, J.

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1908.

HARPAL SINGH  
v.  
LEKHRAJ.

estate devolved according to the rules of primogeniture governing impartible estates and did not pass to the widow of the nephew as an estate governed by the ordinary rules of Hindu law.

FIRST APPEAL from the decree of W. R. G. Moir Esq., C. S., District Judge of Jaunpur.

The property involved in this suit was the impartible estate known as Singramau, situate in the District of Jaunpur. Rai Randhir Singh was the last *gaddinashin*, and on 15th December, 1894, he executed a will in favour of his wife Sonao Kunwar whereby he devised to her his "entire estate and every kind of moveable and immoveable property," and excluded his nephew "Sheopal Singh, whose conduct and manners are unworthy and ungentlemanly." Rai Randhir Singh died on January 4th, 1895. On the strength of the will, the Collector had the name of Sonao Kunwar entered in respect of all the property left by Randhir Singh. On 21st June, 1895, Sonao Kunwar applied for the probate of the will of Rai Randhir Singh. Sheopal Singh instituted a suit against Sonao Kunwar for cancellation of the will and recovery of possession of the property, but on 25th April, 1896, a compromise was effected between the two contestants. The real intent and effect of this compromise was the main question in this appeal. The document ran thus :—

"In the above case a compromise has been effected between the parties in the following way:—

1. The name of Must. Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded and she will remain in possession during her life-time of all the moveable and immoveable properties, of which Rai Randhir was in possession, exercising the powers of *gaddinashin* without the power to transfer or charge the estate in any way.

2. I, Thakur Sheopal Singh will take the sum of Rs. 12000/- a year at the rate of Rs. 1000/- per month from Must. Thakurain Sonao Kunwar for all my expenses, and I Must. Thakurain Sonao Kunwar will pay the same. I Thakur Sheopal Singh will not interfere with the estate in any way in the life-time of Must. Sonao Kunwar. After the death of Must. Thakurain Sonao Kunwar, I, Thakur Sheopal Singh, or any representative of mine, who may be living at that time, will be the absolute owner of all the moveable and immoveable properties, possessed by Rai Randhir Singh and will occupy the *gaddi*. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh will have power to recover the same by instituting a suit and attaching the profits and moveable property belonging to Thakurain Sonao Kunwar.

3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any *rais*, on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreation *et cetera*, I will take any conveyance I like for my use. Thakurain Sonao Kunwar will have no power to forbid me.

4. If on any particular occasion any indispensable necessity arises in the estate and it be necessary to take a loan, we Thakur Sheopal Singh and Must. Thakurain Sonao Kunwar will in concurrence with each other, borrow five or ten thousand rupees and repay the same gradually from the profits of the estate.

5. I, Thakurain Sonao Kunwar also accept all the aforesaid conditions. It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree.

The compromise as written is correct."

A decree was passed in the terms of the compromise. Sheopal Singh predeceased Sonao Kunwar leaving a widow Thakurain Lekhraj Kunwar, the plaintiff. Thakurain Sonao Kunwar died on June 20, 1904, and Thakur Harpal Singh's name was ordered by the Collector to be entered in the Revenue papers in place of Sonao Kunwar and he was put in possession. The present suit was, therefore, instituted by Lekhraj Kunwar to recover possession of the estate. According to her plaint, the will of Randhir Singh conferred an absolute estate on Sonao Kunwar, and by the terms of the compromise between Sonao Kunwar and Sheopal Singh, the former became a proprietor with some restrictions on her rights till her death, and Sheopal Singh became an absolute owner. She alleged that the original character of the estate was thus altered and that she was entitled to succeed to the property as the representative (*kaim mukam*) of Sheopal Singh, who had acquired a right to the estate under the contract embodied in the compromise. She challenged the Collector's order allowing mutation of names in favour of Harpal Singh.

Harpal Singh and Shamsheer Bahadur Singh filed separate defences in which they contended that a custom of strict primogeniture in favour of males obtained in the family, that Sheopal Singh acquired no right to the estate by the deed of compromise, and as he predeceased Sonao Kunwar, his widow acquired no right on the latter's death. They further contended

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HARPAL SINGH

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that the *gaddinashin* and the members of the younger branches of the family were members of a joint Hindu family and if Sheopal Singh be deemed to have acquired any right, Harpal was entitled to succeed him by right of survivorship. Shamsher Bahadur further denied that the estate was alienable and that Randhir Singh had power to execute a will. The District Judge decreed the suit.

Defendants appealed.

*Sundar Lal*, (with him *Satish Chandra Banerji*), for the appellants. The whole question in this appeal was as to the effect of the compromise entered into between Sonao Kunwar and Sheopal Singh. The will having been followed by a compromise, it was not necessary to discuss the provisions of the will. The Singramau estate was admittedly an impartible estate. Did this compromise bring about any alteration in its original character and introduce a new rule of succession? It was submitted that it did not. There were two claimants each setting up a different antagonistic title. The issue hung as it were in a nice balance, and the compromise was entered into in order to put an end to a long and expensive litigation. The compromise in fact recognised and acknowledged an antecedent title. The original character of the estate was in no way affected; the property remained where it was and what it was; merely certain conditions were attached to its present enjoyment. The title of Sheopal Singh was recognised and declared, but enjoyment by him was partially deferred.

*Rani Mewa Kunwar v. Rani Hulas Kunwar*, [1874] L. R., 1 I. A., 157, 166.

*Oudh Behari Lal v. Rani Mewa Kunwar*, [1868] N.-W. P., 82.

*Govind Krishna Narain v. Abdul Qayyum*, [1903] I. L. R., 25 All., 546, 577.

*Bachcho Kunwar v. Dharam Das*, [1906] I. L. R., 28 All., 347.

*Ram Shankar Lal v. Ganesh Prasad*, [1907] I. L. R., 29 All., 451.

It was submitted that the title became at once vested in Sheopal Singh, and upon his death, according to the rule of succession governing impartible estates under the Hindu Law, Harpal would be the owner.

*Kachi Kaliyanu v. Kachi Surva*, [1905] L. R., 32 I. A., 261 S. C., I. L. R., 28 Mad., 508.

For purposes of succession an impartible estate possessed all the incidents of joint property.

*Raja Rup Singh v. Rani Baisni*, [1884] I. L. R., 7 All., 1, P. C.

*Stree Rajah Yanumula Venkayamah v. Stree Raja Yanumula Boochia Vankondora*, [1870] 13 Moo. I. A., 333, 336.

Survivorship and all the other rules of succession applicable to joint family equally applied to an impartible estate when it was held by one person and there had been no division.

*Chintamun Singh v. Nowlukho Honwari*, [1875] I. L. R., 1 Cal., 153, 159.

*Naraganti Achammagaru v. Venkatachalapati Nayanivarur*, [1882] I. L. R., 4 Mad., 250.

*Doorga Persad Singh v. Doorga Konwari*, [1878] I. L. R., 4 Cal., 190, 201.

*Muttuvaduganadha v. Periusumi*, [1896] L. R., 23 I. A., 128, 137.

*Jogendra Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh*, [1890] I. L. R., 18 Cal., 151.

*Sri Raja Lakhshmi Devi Garu v. Sri Raja Surya Narayana*, [1897] I. L. R., 20 Mad., 256.

*Ramnundain v. Maharani Janki Koer*, [1902] L. R., 29 I. A., 178.

*Surjanarain Singh v. Tribhuwan Sundar*, F. A. 144 of 1896, decided on 19th June, 1899 (unreported).

The mere fact that Sonao Kunwar was in possession of the estate will not alter its character.

*Sarabjit Pratap Bahadur Sahi v. Indarjit Pratap Bahadur Sahi*, [1904] I. L. R., 27 All., 203, 243,

The case of

*Pateshrsi Pratap Narain Singh v. Rudra Narain Singh*, [1904] I. L. R. 26 All., 528, 551.

was distinguishable. There a usurper had been in possession for more than 12 years and he left the property. The impartible character of the property had ceased. In the present case what Randhir Singh did by his will was that he introduced a new tenant, the tenure remaining the same. According to the then state of rulings Sonao Kunwar took only a life estate under the will, and Sheopal Singh had a good fightable case.

*Abdul Wahid v. Narain Bibi* [1885] I. L. R., 11 Cal., 597, P. C.

was distinguished, and it was submitted that it was not necessary to go into the various other points discussed by the District Judge.

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*B. E. O'Connor*, for the respondents :—Randhir Singh's will was duly registered. The presumption is in favour of testamentary capacity. The subsequent settlement was not made on the basis of lack of disposing power or capacity. Sheopal Singh withdrew his caveat. The Probate was conclusive and it put an end to the antecedent title, if any, of Sheopal Singh.

Indian Evidence Act, section 41.

Amir Ali and Woodroffe's Commentary, 267.

Sonao Kuar took an absolute estate under the will. There was no remainder over in favour of any member of the family. After the will, the *guddi* as *guddi* was gone, even if any link existed between Randhir Singh and the defendants, who were separate from him in food, worship and residence, the will destroyed that link, and it could not be subsequently restored.

The compromise of 1896 recognised the right of neither party in whole or in part. Sonao Kuar took a limited estate under the compromise, and impartibility was not revived, at least so far as the peculiar rules of succession were concerned. The relations between Sheopal Singh's branch of the family and defendant's branch of the family had been estranged for generations. Persons who were ten degrees removed from Sheopal Singh could not be contemplated as his *Kaim Mokam*. If the defendant's contention were correct the words *mustaqil malik* in the compromise were surplusage. It was submitted that words had been used in the compromise to mark out especially Sheopal Singh's widow and daughter. The compromise created a right in Sheopal Singh and his widow and his daughter. The plaintiff was entitled to succeed by virtue of that contractual right.

Upon the question of the construction of the compromise appellants referred to a family of cases in which the same compromise was construed. The essential distinction here was that the entire estate was at stake. Part of the property did not go to one party and part to another. There was no division of property, the whole estate passed by virtue of the compromise.

*Abdul Wahid v. Nuran Bibi*, [1885] I. L. R., 11 Cal., 597, 599, 603, 606, P. C.

*Bachcho Kunwar v. Dharam Das*, [1906] I. L. R., 28 All., 347, 352.

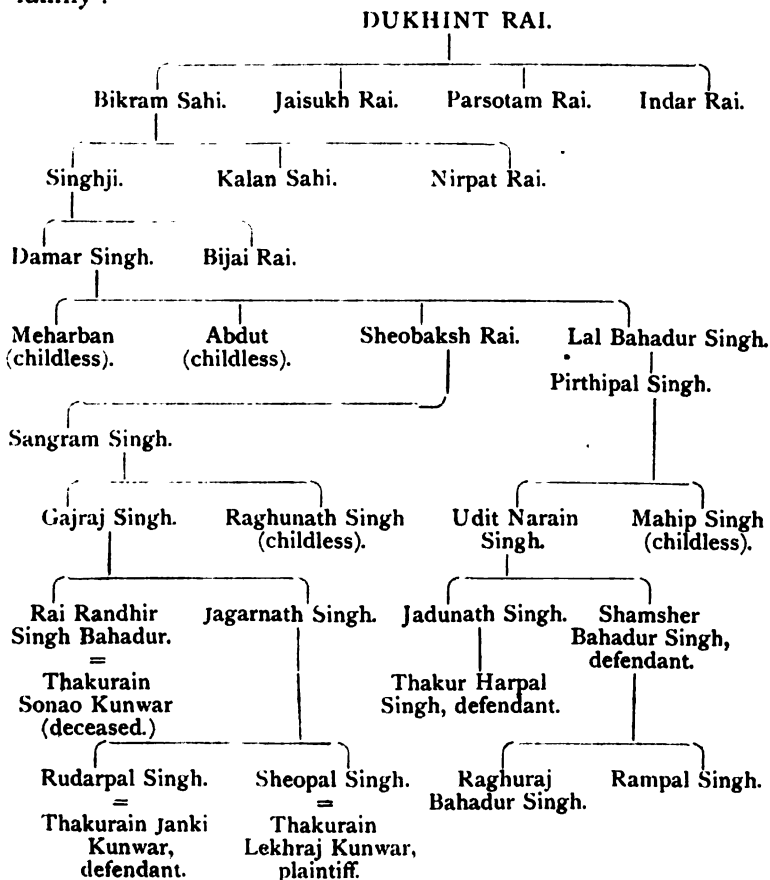
The cases show that every compromise is not a recognition of a prior title. This compromise clearly was not such a recognition, and is closely parallel to the 11 Cal. case. As this compromise was made after the Transfer of Property Act became law, it is possible that Sheopal Singh took a vested estate, but no attempt has been made to show that the coparcenary was re-created by the compromise. In any case the defendants cannot be the representatives (Kaim Mokam) of Sheopal Singh, if they claim to come in as survivors.

*Sundar Lal*, in reply, cited

*Monmohini Guha v. Bangu Chandra Das*, [1903] I. L. R., 31 Cal., 357.

The judgment of the Court was delivered by

STANLEY, C. J.—The title to the Singramau estate in the district of Jaunpur, an estate of considerable extent and value, is involved in this appeal. This estate was up to the date of the death of Rai Randhir Singh on the 4th of January, 1895, admittedly impartible. The following genealogical table which is admitted to be correct, will show the relationship of the family :—



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Abdut, the second son of Damar Singh, died childless in 1795, and was succeeded by his nephew Sangram Singh ; and he was succeeded by his eldest son Gajraj Singh, who died in 1857. Rai Randhir Singh, the eldest son of Gajraj Singh, then succeeded to the property. Three weeks before his death he executed a will in favour of his wife Thakurain Sonao Kuar—of all his property. His nephew Sheopal Singh was his nearest male relative at the time of his death, and he, on the 28th of March, 1896, instituted a suit against Sonao Kuar for possession of the estate alleging that Randhir Singh was not of sound and disposing mind when he made his alleged will. He also averred that the estate was impartible and inalienable, and therefore Randhir Singh had no power to dispose of it as he purported to do. This suit was compromised, on the 25th of April, 1896, and practically the only question which we have to determine is the effect of this compromise.

The learned District Judge delivered a very elaborate and lengthy judgment but with many of the topics to which he has referred we think it unnecessary to deal. It is admitted that the estate in the hands of Randhir Singh was an impartible estate, and it is also admitted that Sheopal Singh would have succeeded to that estate if no valid disposition had been made of it by Randhir Singh. Therefore it appears to us to be unnecessary to treat of matters prior to the death of Randhir Singh, except so far as they show the circumstances of the family and throw light on the documents which we have to construe.

Sheopal Singh predeceased Musammat. Sonao Kuar, dying on the 27th of July, 1899. She died on the 20th of June, 1904. Sheopal Singh left a widow, the plaintiff Lekhraj Kuar, and also a daughter but no son. Upon his death, if it be held that he acquired under the compromise an absolute interest in the estate, it still being an impartible estate, the defendant appellant, Thakur Harpal Singh, would admittedly be now entitled to it according to the rule of primogeniture. We may here mention that a number of villages were appropriated for the maintenance of the junior members of the family a number of years back. 9 villages were set apart for Pirthipal's branch, and 4 for Sheopal. Of the 9 villages, 5 were sold and the members of the family to whom they

belonged have only now exproprietary rights therein. The members of the family are still therefore joint in estate though they are separate in food and worship. Whatever be the rights of the family in these villages, they form part of the estate, and if the junior branches become extinct will revert to the head of the family. We may also here mention the fact that the junior members of the family did not live in harmony with the members of the senior branch, but on the contrary, there was constant ill-feeling, and litigation between them. There is no contest between Harpal Singh and Shamsher Bahadur Singh. They have agreed to divide the estate between them in the event of their appeal being successful. The contest is between them and Thakurain Lekhraj Kuar whose case is that Sonao Kuar under the will of her husband Randhir Singh acquired the property as her *Stridhan*, and that under the compromise in the events which have happened, the property has devolved upon her as the representative of Sheopal Singh.

On the death of Sonao Kuar, Harpal Singh got possession of the estate, mutation of names having been effected in his favour.

We now turn to the impeached will of Randhir Singh, which is dated the 15th of December, 1894. It opens with a detail of the property which the testator was possessed of, and then follows a recital that the testator has no male issue and that there was no sensible and qualified man in the family to look after and manage the estate and acquire fame; that his nephew Sheopal Singh was separate from him, and that his conduct and manners were quite unworthy and incompatible with the position of a *rais*, and that he had no hopes that he would maintain the reputation of the family. He then appoints his wife Sonao Kuar "as legatee of my entire estate, and every kind of moveable and immoveable property of which I am in possession up to this time, and Babu Sridat, whom I brought up from a child as manager" and then he declared that they should hold **proprietary** possession of his estate and entire moveable and immoveable property from the date of his death, and that the legatee, that is, Sonao Kuar should have every power as proprietor, and Babu Sridat should manage the estate in obedience to and with the advice of the legatee. Then the

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testator gave a direction that the legatee should keep in view the fact that Sheopal Singh was separate, and owing to his misconduct, the testator did not eat with him, yet that he had set apart some property for his support, and that she should continue the support. This is the substance of the will.

It is unnecessary for us to determine what estate Must. Sonao Kuar took under this will assuming it to have been a valid will, whether she took an absolute estate or merely a Hindu widow's estate. Sheopal Singh at once disputed the will, and on the 28th of March, 1896, instituted a suit against Sonao Kuar, and Babu Sridat to have it declared that the will was void, and for possession of the estate of Randhir Singh and mesne profits. The plaint in that suit is to be found in First Appeal No. 25 of 1903, No. II C of the record. In the first paragraph of it the estate of Singramau is described as impartible and untransferable, the custom of the family being that the senior male member is the occupant of the *gaddi*, while the rest of the members are recipients of maintenance, and that on the death of an occupant of the *gaddi*, no right to the estate passes to the widow but that the eldest son succeeds him, and supports all the members of the family with the income of the estate. In the second paragraph, the succession is traced from Dukhint Rai to Randhir Singh. Then the fifth paragraph contains an allegation that when Randhir Singh was in a weak and dying condition, he was brought to Jaunpur so as to be taken to Ajudhiaji so that he might end his days there, and that when he was in this condition, the defendants obtained from him the will in favour of Musammat Sonao Kuar. Then follows an allegation that on account of old age, weakness and illness Randhir Singh was quite incapable of forming a rational judgment in respect of his affairs, and incapable of making a will. In the sixth paragraph is the allegation that on the death of Randhir Singh, according to old custom and the nature of the property and also by right of survivorship, the right to occupy the *gaddi*, and take possession of the entire property passed to the plaintiff. Before the institution of this suit, Sonao Kuar had on the 21st of June, 1895, applied for probate of the will of Randhir Singh, and this application was opposed by Sheopal Singh. The suit of Sheopal Singh was compromised, and it is upon the true construction of the

compromise that the real question in this appeal depends. The translation of it in the paper book before us has been accepted by both sides, and with the exception of a few words in it which might be otherwise, and better, translated, and to which we shall presently refer, it appears to be substantially accurate. In view of its importance, we give it *in extenso*. It runs as follows:—[After quoting the compromise as given above his Lordship proceeded.]

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A decree was passed in the terms of the compromise on the 27th of April, 1896.

The contention on behalf of the defendants is that under this compromise, a vested interest in the estate in the character of an impartible estate was subject to the life estate of Musammat Sonao Kuar limited to Sheopal Singh and that upon his death, it passed to his next heir according to the rule of primogeniture, and not to his widow. On the other side, the contention is that the compromise maintained the possession of Musammat Sonao Kuar under the will with a restriction only on alienation imposed upon her; that the impartibility of the estate was destroyed by the will of Randhir Singh, and that Sonao Kuar held the estate as an estate governed by the ordinary rules of Hindu Law, and that upon her death, Sheopal Singh having predeceased her, it devolved on the plaintiff respondent as his personal representative.

The learned District Judge held that Musammat Sonao Kuar took an absolute alienable estate in the property under her husband's will, and that apart from the compromise, Sheopal Singh had no title whatever; that any right which he acquired was acquired under, and was referable to the compromise. His views are thus expressed in the judgment "If the question arises under what title A took what was awarded to him under a compromise of doubtful rights between himself and B, it must be ascertained which was the better title before the compromise to the estate awarded to A, A's, or B's. The decision of this point will not alter the fact that A took the estate allotted to him under the compromise, but it will determine whether A took it under his own antecedent title or by virtue of the abandonment by B of his antecedent title. We have then to apply this reasoning to the compromise between Musamm at Sonao Kuar and Sheopal Singh. It has been found

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that Musammat Sonao Kuar had an absolute alienable estate and hence that Sheopal Singh had no title whatever in himself except a contingent title in the event of Musammat Sonao Kuar dying without alienating the estate by gift or devise. Had he survived Musammat Sonao Kuar, whatever he took under the compromise, he would have taken not under his own supposed title as owner which had no existence, not even as a reversioner to a widow's estate, which was not the title he set up, for this title too had no existence, but by virtue of Musammat Sonao Kuar's abandonment of her rights as absolute owner. This was a title arising out of the compromise only ; a title by contract and not a title based on Sheopal Singh's antecedent right."

Does this accurately represent the facts and is the exposition of the law laid down by the learned District Judge correct ? If the will of Randhir Singh was not valid, then on the death of Randhir Singh, Sheopal Singh became entitled to the estate as his successor. Sheopal Singh impeached the will of Randhir Singh on the ground that Randhir Singh was not a competent testator and also on the ground that the estate was not merely impartible but inalienable. He claimed the estate as the successor of Randhir Singh, according to the rules of primogeniture, and he claimed it as an impartible estate. Whether he had sufficient grounds for impeaching the will, it is not, we think, material to consider. But in view of the circumstances under which the will was made, it would be difficult to hold that his suit was without foundation. The will was made shortly before the death of Randhir Singh who was a decrepit old man of 74 years of age in a dying condition. The learned District Judge went behind the compromise. He determined what the rights of the parties were before the compromise, the very thing the avoidance of which led to the compromise. He determined the dispute which the parties designedly left undetermined and held in effect that the will was a valid will and binding on Sheopal Singh, overlooking the fact that Sheopal Singh withdrew his opposition to the will, on the faith of the compromise. If Sheopal Singh had not withdrawn his opposition, it is impossible to say what would have been the result of his suit or of the probate suit. Now let us see what the provisions of the compromise were, bearing in mind the circumstances

which led up to it. It provides in the first paragraph that Sonao Kuar shall remain in possession of the estate during her lifetime "exercising the powers of *gaddinashin*", and in the next paragraph in which an annuity of Rs. 12000 a year is provided for Sheopal Singh, during the life of Sonao Kuar, it is provided that after the death of Sonao Kuar, Sheopal Singh will be the absolute owner of the estate and will occupy the *Guddi*. The words *Gaddinashin* and *Gaddi* are only properly applied in connection with an impartible estate, and the use of them in the compromise, indicates that the intention of the parties was that the estate should continue impartible as it had been for generations. In other words, the compromise was a recognition by Sonao Kuar of the claim put forward by Sheopal Singh that the estate was impartible. Sheopal Singh on his part, made this concession to Sonao Kuar that during her life, subject to the payment of the annuity, and to certain other restrictions, she should remain in possession, and exercise the powers of *Gaddinashin*. It seems to us that by the compromise, the parties agreed that the estate should retain its old character of impartibility.

But it is argued that inasmuch as Letters of Administration of the estate of Randhir Singh with the will annexed were subsequently granted to Sonao Kuar, it must be taken that the will had full operation, and that by it, the impartible nature of the estate was destroyed, and that whatever was the interest which Sheopal Singh acquired under the compromise that was an interest in an estate which was no longer impartible but an estate governed by the ordinary rules of Hindu Law. As to the grant of Letters of Administration what happened was this. After the execution of the compromise—Sheopal Singh withdrew his opposition to the grant of Letters of Administration with the will annexed. He filed a petition on the 25th of April, 1896, in which he stated that he had no objection to the grant, a compromise having been effected. It was no longer any concern to him whether the will was proved or not. His rights were secured by the compromise. The suit then proceeded as against Thakurain Shanker Kuar, another widow of Randhir Singh who was the sole remaining objector, and the will was established as against her. It is contended that the grant of Letters of Administration to Sonao Kuar

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establishes the case of the plaintiff that the property passed to Sonao Kuar under the will, and that it must be taken to have devolved on her free from its former character of impartibility. We cannot accede to this contention. The rights of Sonao Kuar and Sheopal Singh must be determined by the provisions of the compromise, and in view of the claim which each put forward. Sheopal Singh having secured for himself the succession to the estate as an impartible estate, was no longer concerned with the will of Randhir Singh, and therefore withdrew his opposition to the grant of Letters of Administration.

Then it is said that in view of the bad feeling which existed between the senior and junior branches of the family, Sheopal Singh not having male issue would naturally consider the interests of his wife and daughter, in preference to that of the members of a junior branch of the family, and would have preferred to take the estate as one governed by the ordinary rules of Hindu Law, so that it should pass on his death to his wife and daughter, rather than as an impartible estate which on his death would pass away from these persons. The answer to this is that he and Sonao Kuar elected to maintain the impartible nature of the estate as the language of the compromise indicates. At the time of compromise moreover, Sheopal Singh was a young man of 32 years of age, and he no doubt had every reason to hope that he would have male issue. The compromise is the governing proceeding in the case, and it appears to us upon its true construction that it was a recognition by Sonao Kuar of the impartible nature of the estate and a settlement of that estate upon Sheopal Singh, subject to her own life-estate therein, Sheopal Singh on his part giving up his immediate interest in the estate during the life of Sonao Kuar, on payment to him of an annual sum of Rs. 12,000.

But we must advert to another point which has been made upon the compromise by the learned Counsel, for the plaintiff respondent and that is this. These words are to be found in it "After the death of Musammat Thakurain Sonao Kuar, I, Thakur Sheopal Singh or any representative of mine who may be living at the time will be the absolute owner of all

the moveable and immoveable properties possessed by Rai Randhir Singh and will occupy the *Gaddi*." It is contended that the words "any representative of mine" mean the personal representative of Sheopal Singh and that the intention was that the estate should devolve on Sheopal Singh in case he survived Sonao Kuar but that in case of his pre-deceasing her, it should devolve on his personal representative. The translation of the words "or any representative of mine," does not accurately express the vernacular words used. The words in the vernacular are "*Qaim mukam*" that is one who takes the place of another, *i. e.* a successor. The word which denotes personal representative is "*Waris*." Translating the words "*Qaim mukam*" as "successor" they would be quite appropriate words to use to denote the successor to an impartible estate whether that successor happened to be a son or a more distant relative. As the representative was also to be his successor on the *Gaddi*, he could not have intended that his widow would be intended in that term. The words seem to be used as words of limitation, marking out the estate which Sheopal Singh was intended to take, namely, an absolute estate, just as the word "heirs" in English law, for example, in a grant to a man and his heirs denote a fee simple estate. We do not think therefore that there is any force in this argument.

The learned District Judge appears to us not to have correctly apprehended the meaning and effect of the compromise. At the time it was entered into the position was this. Sonao Kuar claimed the estate of her husband under his will. Sheopal Singh disputed the will and claimed the estate as the successor to Randhir Singh. If the will were established Sonao Kuar would be entitled to the estate, otherwise Sheopal Singh was entitled to it. A clear issue was knit between them and there was undoubtedly a good fighting case. In the case of *Rani Mewa Kuar v. Rani Hulas Kuar* (1), there were two claimants, namely, Rani Mewa Kunwar and Rani Hulas Kunwar, on the ground of heirship to immoveable property situate in Rohilkhand and Oudh. By a deed of compromise they agreed to divide the property in certain proportions, and the agreement was carried out in Rohilkhand but not in Oudh, where the respondent

(1) [1873] L. R. 1 I, A, 157.

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was, and continued, in possession. After the lapse of 9 years from the date of the deed of compromise, the appellant Rani Mewa Kunwar sued for possession of her share of the property in Oudh. The Judicial Commissioner of Oudh decided that the suit was founded on the contract contained in the deed of compromise or for a breach of it, and was therefore barred by limitation. It was held by their Lordships of the Privy Council that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the appellant to prove her case, and not all her case. Their Lordships say at p. 164 referring to the compromise "that agreement assumes that the parties were severally claiming by virtue of some right of inheritance, the property of Raja Rattun Singh; that there were questions between them which might disturb the rights which each claimed, and it was better instead of a long litigation to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares and shall be divided according to those shares." Then at page 166 they say "The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case. "The principle laid down in this case has been adopted in several cases in this High Court.

In the case of *Govind Krishna Narain v. Abdul Kayyum* <sup>(1)</sup> the title taken under a compromise between persons having mutually exclusive claims, was considered. On the death of one Ratan Singh disputes arose between his widow Raj Kuar and Sen Kuar, the widow of his son Daulat Singh, who had predeceased his father. After the death of the two widows, three claimants to the estate arose, namely, Chattar Kuar and Mewa Kuar, the daughters of Sen Kuar and Khairati Lal, the son of a daughter of Rattan Singh. The conflicting claims of these parties were settled by a compromise by virtue of which Khairati Lal obtained  $7\frac{1}{2}$  annas

(1) [1903] I. L. R., 25 All., 546.

and Chattar Kuar and her sister Mewa Kuar  $4\frac{1}{4}$  annas each out of the property of Ratan Singh. It was contended that Khairati Lal had a complete title to the whole of the property subject to the compromise, he being son of Rattan Singh's daughter and that he made a grant to the two Ranis of more than half the property out of kindly feeling towards them. This argument was repelled as devoid of force. The Bench, of which one of us was a member, held that the parties came together as persons at arms length, each side claiming the whole estate through different lines of descent, each side having a good fighting title and to avoid litigation consented to an amicable division of the disputed estate.

Again in the case of *Bachho Kuar v. Dharam Das* <sup>(1)</sup> which was heard by a Bench of which one of us also was a member, the effect of a compromise was also considered. Two persons named Paras Das and Umrao Singh laid claim to property as reversionary heirs of Pardman Kuar. Their claim was resisted by Dip Chand on the allegation that he was the adopted son of Pardman Kuar and as such entitled to succeed to his property. A compromise was entered into according to which the right of Paras Das and Umrao Singh to one half of the property was recognised, they mutually abandoning all claims to the other half. It is evident that if Dip Chand failed to establish the validity of his adoption, Paras Das and Umrao Singh would as reversionary heirs have succeeded in their claim to the whole of the property of Pardman Kuar. If on the other hand the validity of the adoption was established the claim of Paras Das and Umrao Singh was bound to fail. It was held that the compromise and decree passed on it amounted to a recognition by Dip Chand of the rights of Paras Das and Umrao Singh as reversionary heirs as they had previously asserted them so far as regards one-half of the property and could not be regarded as conferring a new and distinct title on them; that Paras Das and Umrao Singh in fact under the compromise acquired a moiety of the property in the capacity of reversionary heirs of Pardman Kuar, and in that capacity alone. Reliance was placed upon the judgment of their Lordships of the Privy Council in the case of *Rani Mewa Kuar v. Rani Hulas Kuar*, referred to above in this judgment.

(1) [1906] I. L. R., 28 All., 347.

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The same question was considered by another Bench of this High Court of which also one of us was a member in the case of *Ram Shanker Lal v. Ganesh Prasad* <sup>(1)</sup>. The facts of that case were these. One Munni Lal died leaving certain property of which his widow Jasodha Kuar took possession. Jasodha Kuar died leaving the property by will to her daughter Anpurna, who also died after making a will leaving the property to her husband Ram Shanker Lal. Both the wills provided that the devisee was to pay off certain incumbrances affecting the property. After the death of Anpurna the property was claimed by the reversionary heirs of Munni Lal. But this claim was settled by a compromise by which Ram Shanker Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property. It was held that the compromise did not convey to Ram Shanker Lal the title of the reversioners but that he took under the will of his wife. We find in the judgment this observation in reference to the compromise, "We think that by this deed the executants of it, in view of the trouble and uncertainty which would attend a suit for possession of the property relinquished their claim to the property, waived their claim to bring such a suit, and admitted the title by virtue of which Ram Shanker Lal was then in possession. It did not in our opinion clothe Ram Shanker Lal with all the rights which the executants had as reversioners to Munni Lal's estate."

Mr O'Connor in the course of his ingenious and able argument for the respondents relied on the ruling in *Abdul Wahid Khan v. Nuran Bibi* <sup>(2)</sup>. That was a case between Mahomedans and was governed by Mahomedan Law. One Mouazzam Khan died on the 22nd of January 1850, leaving a widow named Gauhar Bibi and also Abdus Subhan and Abdul Rahman, who claimed to be his legitimate sons. Gauhar Bibi was in possession of the villages in dispute in the Rai Bareli district at the annexation of Oudh in 1856, and the summary settlement was made with her and after the general confiscation followed by the restoration and the summary settlement of that year, the settlement of the villages was again made with her. She continued in possession till her death on the 18th of October, 1875. In the course of proceed-

(1) [1907] I. L. R., 29 All., 451. (2) [1885] I. L. R., 11 Cal., 597.

ings at the regular settlement litigation took place between the alleged sons on the one side, and Gauhar Bibi on the other, resulting in a compromise by which it was agreed that Gauhar Bibi should during her life-time continue to hold possession, and remain proprietor without power of alienation, and that after her death the two sons should possess each one half of the property. The two sons predeceased Gauhar Bibi. It was held that upon the true construction of the compromise, the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her life-time. The case came before their Lordships of the Privy Council on appeal from the Judicial Commissioner of Oudh, who held that the effect of the compromise was to give Gauhar Bibi a life-interest in the estate, and on the death of Abdul Rahman and Abdus Subhan, their heirs took their place and had a right to their property on Gauhar Bibi's death. Their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage and that it would be opposed to the Mahomedan Law to hold that the compromise created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the life-time of Gauhar Bibi. It will, therefore, be seen that this decision was based upon Mahomedan Law, according to which it is not permitted to limit an estate to take effect after the determination on the death of the owner of a prior estate by way of what is known in English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate. The limitation of such an estate is in no way prohibited by Hindu Law and it appears to us clear upon the true interpretation of the compromise entered into between Sheopal Singh and Sonao Kuar that Sheopal Singh took an absolute vested estate in the property, the enjoyment of it being postponed during the life of Sonao Kuar. We also think that upon the language of the compromise it is not possible to hold that the character of the estate as it had been handed down from father to son for generations was changed. As an impartible estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him. The concession made to Sonao Kuar by him was that she should enjoy it for her life and sit upon the *gaddi* as *gaddinashin*, his occupa-

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tion of the *gaddi* being postponed. On the death of Sheopal Singh, therefore, the estate in our opinion devolved according to the rules of primogeniture governing impartible estates and did not pass to his widow as an estate governed by the ordinary rules of Hindu Law. We therefore think that the suit of the plaintiff ought to have been dismissed. We allow the appeal, set aside the decree of the court below, and dismiss the plaintiff's suit with costs in both Courts, including fees in this Court on the higher scale. The objections under S. 561 of the Code of Civil Procedure necessarily fail and are dismissed with costs.

S. C. C.

*Appeal decreed.*

CRIMINAL.

1908.

May, 15.

KNOX, J.  
AIKMAN, J.

## KING EMPEROR

*versus*

LACHMI NARAIN.\*

*Excise Act (XII of 1896), sections 44(2), 48, 57—Sub-Inspector—  
Excise Officer.*

When the police arrested a man with 18 tolas of charas and through their official superior brought the accused before a Magistrate, *held*, that there was sufficient compliance with the provisions of sections 44 and 57 of the Excise Act, and the accused could be tried by such a Magistrate. *Queen-Empress v. Makunda*, I. L. R., 20 All., 70, followed.

CRIMINAL APPEAL against the order of H. W. Lyle Esq., Sessions Judge of Agra reversing an order of E. Bennet Esq., Joint Magistrate.

The respondent, Lachmi Narain, who is a licensed vendor of *charas* was one day seen by one Pattu Lal a whole-sale vendor, with a bundle on his person. He was asked certain questions. Lachmi Narain hastened away and this aroused the suspicion of Pattu. He spoke to the constable who was standing on duty, and as he called, the accused ran away. He was therefore arrested, and it was found that he carried a parcel of *charas* which was afterwards found to be 18 tolas. The Joint Magistrate found the accused guilty, and sentenced him to

\*Criminal A. 276 of 1908.

rigorous imprisonment for three months and a fine of Rs. 40. The Sessions Judge on appeal held that as there was no complaint by an Excise Officer, the prosecution could not be maintained. He therefore acquitted the accused.

The Local Government appealed.

*A. E. Ryves*, Government Advocate, for the appellant, submitted that the case was governed by section 48 of Act XII of 1896. No doubt a court could not take cognisance of an offence under that section, except upon the complaint of an Excise officer. Here that was supplied by the report of the Police officer. The question, therefore, was whether the Sub-Inspector of Police was an Excise officer within the meaning of section 57. Section 44 sub-section (2) answers that question, and according to that certain Police officers invested with powers under the Act were deemed Excise Officers. That Sub-Inspectors were such officers was clear from Government notification No. 128-XIII-57-1, dated 6th June, 1885. He relied on

*Queen-Empress v. Makunda* [1897], I. L. R., 20 All., 70.

*Satya Chandra Mukerji*, for the respondent, submitted that in this case the accused was arrested by a constable and was sent up by a sub-inspector. The Excise officer had appeared only as a witness. The police officers were not excise officers within the meaning of the Act.

The judgment of the Court was delivered by

KNOX J.—This is an appeal by the Local Government from an appellate judgment of acquittal, passed by the learned Sessions Judge of Agra. The accused was convicted by a Magistrate of the first class of an offence, under section 48 of Act No. XII of 1896. He was sentenced to the maximum term of imprisonment prescribed by the section, and to a fine of Rs. 40. On appeal, the conviction and sentence were set aside by the learned Sessions Judge of Agra, on the ground that under section 57 of the Act, no Court can take cognisance of an offence under the Act, except on a complaint or report of an Excise Officer. According to the evidence for the prosecution, the accused was arrested with eighteen tolas of *charas* in his possession by a police constable and a head constable. They, through their official superior, brought the case for trial

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before the Magistrate. The learned Judge held that the police could not institute the proceedings, and that they could only be instituted by an Excise Officer, which term, the learned Judge holds, means the Excise Inspector, or, where there is no such officer in the District, the Collector or Assistant Collector in charge of Excise. In our opinion, the view taken by the learned Judge is erroneous. He overlooked the provisions of section 44, Sub-Section (2) of the Act. The learned Government Advocate has called our attention to the ruling in *Queen-Empréss v. Makunda* <sup>(1)</sup>, which fully supports the view for which he contends. We have heard what the learned vakil, who appears for the accused, could say on his client's behalf. We have also read the evidence. In our opinion, it clearly proves an offence under section 48, clause (e) of the Excise Act, 1896. We were addressed on the question of sentence. It is apparently the first time that Lachmi Narain has been convicted. He has already been upwards of three weeks in jail and he has paid the fine which was imposed on him. We accordingly allow this appeal, and, setting aside the judgment of acquittal, convict Lachmi Narain of the offence specified above. We sentence him to the term of imprisonment which he has already undergone, and to the fine which he has already paid.

X.

*Appeal decreed.*

(1) [1897] I. L. R., 20 All., 70.

## FULL BENCH.

UMAN KUARI

*versus*

JARBANDHAN PATHAK AND ANOTHER.\*

CIVIL.

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June 1.

BANERJI J.  
AIKMAN J.  
KARAMAT  
HUSAIN, J.

*Practice—Order of remand—Appeal from, after decree in suit—Civil Procedure Code (Act XIV of 1882), sections 562, 588, 591—Pre-emption—Wajib-ul-arz—Arazidari land “Haqiat”—“Hissedar”—Deh.*

An appeal lies from an order of remand passed under section 562, Civil Procedure Code, even though before the filing of the appeal, the suit has been decided in compliance with the order of remand. *Rameshur Singh v. Sheodin Singh*, I. L. R., 12 All., 510, F. B., *Jatinga Valley Tea Company v. Chera Tea Company*, I. L. R., 12 Cal., 45, *Babu Lal v. Ram Kali*, 3 A. L. J. R., 40, followed. *Salig Ram v. Brij Bilas*, I. L. R., 29 All., 659, over-ruled.

*Arazidars* in District Basti are not members of the co-parcenary body in a village. A custom of pre-emption, recorded in a *wajib-ul-arz*, in respect of the transfer of a *haqiat* by a *hissedar* applies only to co-parceners, and no claim can be maintained in respect of the sale of *arazidari* land.

APPEAL from an order of remand passed by Munshi Banke Behari Lal, Officiating Subordinate Judge, Gorakhpur, reversing a decree of Babu Jogendra Nath Chaudhri, Munsif of Basti.

The facts of the case are that the plaintiff brought a suit for pre-emption of a plot of *arazidari* land sold by Musammat Ram Raj Kuari to Mt. Uman Kuari. The *wajib-ul-arz* upon which the claim was based provided thus: “When property (*haqiat*) of any share-holder (*hissedar*) is transferred, the right of purchase shall belong in the first instance to the near share-holder who is a relation, and next of kin to the co-sharer in the *patti*, and after him to the co-sharer in the village (*sharik deh*) whose name is entered in the *khewat*. In the event of refusal by the above, strangers shall have a right to purchase.”

\* F. A. F. O. 69 of 1907.



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The plaintiff and the vendor were co-sharers in the same *khata* of the same *patti*, and the plaintiff also owned some *arazidari* land. The vendee was a stranger. The court of first instance held that the provisions in the *wajib-ul-arz* applied to the *khalsa* land but not to the *arazidari* land and dismissed the claim. The Subordinate Judge who heard the appeal was of opinion that since the *arazidars* were assessed to revenue and were parties to the *samima khewat* prepared at the last survey, the clause in the *wajib-ul-arz* applied to them also and remanded the case on 27th March, 1907, under section 562 to be tried on the merits. The Munsif on remand decreed the claim on 20th May, 1907. Subsequently on June 29, 1907, the defendant vendee filed the present appeal from the order of remand to the High Court. It came on for hearing on 18th March, 1908, before AIKMAN, and KARAMAT HUSAIN, JJ., who on account of the conflict between the cases of *Salig Ram v. Brij Bilas* <sup>(1)</sup>, and *Babu Lal v. Ram Kali* <sup>(2)</sup>, referred the case to the Full Bench.

*Satish Chandra Banerji* (for *J. N. Chaudri*), for the respondent, raised a preliminary objection that as the appellant submitted to the order of remand and allowed it to be carried into effect, she cannot now appeal from it. There were two remedies open to her, either she could file an appeal from the order of remand or she could impeach it under section 591 of the Code of Civil Procedure, in the appeal filed from the final decree. If she did not choose to adopt the former course the only other remedy open to her was to file an appeal from the final decree and impeach the order of remand in that appeal, if so advised.

The uniform practice in this court at one time was not to entertain these belated appeals.

*Prag Lal v. Raghubar Das*, [1881] 1 A. W. N., (ed. 1) 211, (ed. 2) 174.

*Ikrumunnissa v. Muhamad Wazir*, [1882] 2 A. W. N., 53.

*Karori Mal v. Sahodra*, [1883] 4 A. W. N., 5.

*Salig Ram v. Brijbilas*, [1907] 1. L. R., 29 All., 659.

*Gulzari Mal v. Karimunnissa*, [1908] 28 A. W. N., 76.

[BANERJI, J. Can an order of remand be questioned under section 591, Code of Civil Procedure in the first appeal before the lower appellate court?]

(1) [1907] 1. L. R., 29 All., 659.

(2) [1906] 3 A. L. J. R., 40.

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It can not be, but it can be impugned in second appeal to the High Court.

[AIKMAN, J. Referred to

*Jatinga Valley Tea Co v. Chera Tea Co.*, [1885] I. L. R., 12 Cal., 45.]

That case has been distinguished in later Calcutta cases. The appeal there seems to have been preferred before the final decree was made and Field, J.'s observations were *obiter*,

*Babu Lal v. Ramkali*, [1906] 3 A. L. J. R., 40,  
is also distinguished on the same ground.

The principle which should be applied is that where the final decree in the cause has been made no separate appeal should be entertained against a prior interlocutory order.

*Madhusudan Sen v. Kamini Kant Sen*, [1905] I. L. R., 32 Cal., 1023.

[AIKMAN, J. That may be excellent reason for the legislature for not allowing an appeal, but how can we legislate?]

*Sheonath Singh v. Ramdin Singh*, [1896] I. L. R., 18 All., 19, 22,  
supports my contention. If there is no ground for appeal against the final decree on the merits, the interlocutory order of remand cannot be impugned. This shows that a bad order of remand is not necessarily *ultra vires*; if it were, then all subsequent proceedings would be *ultra vires* and the final decree could be challenged as made without jurisdiction. In

*Rameshur Singh v. Sheodin*, [1890] I. L. R., 12 All., 510, F. B.,  
the order of remand was, in view of the provisions of section 564, Civil Procedure Code, held to have been made without jurisdiction. But here no question of jurisdiction arises. The court had jurisdiction to decide whether the *waji-bul-arz* applied, and even if it took an erroneous view of the law or facts, the order if made could in no sense be termed *ultra vires*.

*Malkarjun v. Narhari*, [1900] I. L. R., 25 Bom., 337, P. C.

There was no inherent absence of jurisdiction in the lower appellate court to deal with the appeal before it, and section 578, Civil Procedure Code, would cover the case.

*Ledgard v. Bull*, [1886] I. L. R., 9 All., 191, 203, P. C.

*Mohesh Chandra Das v. Jamiruddin Mollah*, [1900] I. L. R., 28 Cal.,  
324.

[BANERJI, J. But in this case the F. B. case in 12 All. is dissented from.]

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It is not necessary for me to contend that the F. B. case upon its facts was wrongly decided. But it is no authority for the point raised in the present case.

*Durga Kinkar Das v. Ronchai Roma*, [1907] 5 C. L. J., 71.

The authorities are fully reviewed in

*Baikuntha Nath Dey v. Salimulla*, [1907] 12 C. W. N., 590.

As to the doctrine of election of remedies see

15 Cyclopaedia of Law and Procedure, 590.

*Surendra Nath Sen (for D. C. Banerji)*, for the appellant.

The Code of Civil Procedure, gives two remedies no doubt, but these are neither co-existent nor alternative. The right of appeal given by section 591 of the Code is weak and doubtful; the question cannot be raised in First appeal to the lower court, and it cannot be raised even in second appeal where the final decree, by reason of findings of fact or otherwise, cannot be challenged on the merits.

Section 588 of the Code is not controlled by Section 586. The decree in a Small Cause case is not open to appeal, but an order of remand is,

*Collector of Bijnor v. Jafar Ali Khan*, [1880] I. L. R., 3 All., 18.

The new Code contains an express provision, see Sec. 105, cl., 2, which to some extent purports to modify the present law. But in neither the new Code nor the old is there anything to show that the intention of the legislature is that where an order of remand has been carried out the party aggrieved cannot file an appeal against that order.

Upon the question of jurisdiction reference was made to  
*Dhan Singh v. Basant Singh*, [1886] I. L. R., 8 All., 519.

In the 29 All., case a very large assumption has been made that the decree passed in compliance with the order of remand cannot be touched, even though the order of remand be set aside. But the decree is an absolute nullity. All proceedings taken subsequent to an illegal order of remand are void.

*Jarbandhan Singh v. Nakchhed Singh*, [1887] 7 A. W. N., 224.

*Chedlal v. Badullah*, [1888] I. L. R., 11 All., 35, 40.

*Rameshur Singh v. Sheodin Singh*, [1890] I. L. R., 12 All., 510.

*Mahgu Kuar v. Faujdar Kuar*, [1891] 11 A. W. N., 105, F.B.

*Maillu Khan v. Than Singh*, *ibid*, 187.

*Babulal v. Ram Kali*, [1905] 26 A. W. N., 28, 3 A. L. J. R., 40.

The order of remand is the foundation and when this is taken away the whole superstructure falls.

*Jatinga Valley Tea Co., v. Chera Tea Co.*, [1885] I. L. R., 12 Cal., 45, was cited with approval in I. L. R., 12 All., at 515.

There are besides practical reasons why the appeal under Sec. 588, should be allowed. It is cheaper and may be heard sooner than a second appeal.

*Satish Chandra Banerji*, was heard in reply.

Their Lordship's then proceeded to hear the appeal on the merits.

*Surendra Nath Sen*, for the appellant.

An *arazidar* cannot have higher rights than the owner of resumed *muafi* land and he cannot therefore have a right of pre-emption under the *wajib-ul-arz*.

*Nardin Das v. Ram Saran Das*, [1898] I. L. R., 20 All., 479.

*Kalian Mul v. Mudan Mohan*, [1895] I. L. R., 17 All., 447.

*Muhammad Ali v. Hukum Kunwar*, [1905] I. L. R., 28 All., 246.

*Raghu Nath v. Kanhya Lal*, [1902] 22 A. W. N., 68.

*Munna Lal v. Narain Das*, [1907] A. W. N., 173.

*Satish Chandra Banerji*, for the respondents, relied upon

*Ramsarup v. Dalip Singh*, [1885] A. W. N., 54,

as a case on all fours. The latest case on resumed *muafi* was

*Narain Das v. Munna Lal*, [1908] 5 A. L. J. R., 302.

The test was whether the party claiming to be a *hissedar* was liable to pay Government revenue, and the word *deh* was large enough to include every piece of land within the ambit of the village.

*Lalta Prasad v. Lalta Prasad*, [1881] 1 A. W. N., 165.

*Sadar Ali v. Dost Muhammad*, [1890] I. L. R., 12 All., 412.

*Ali Hussain v. Tasaduq Hussain*, [1906] I. L. R., 28 All., 124.

C. A. V.

The judgment of the Court was delivered by

BANERJI, J.—This is an appeal from an order of remand made under section 562 of the Code of Civil Procedure in

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a suit for pre-emption. The court of first instance dismissed the suit on the 30th of April, 1906, but the lower appellate court set aside the decree of that court, and remanded the case on the 27th of March 1907. From this order, the present appeal was preferred on the 29th of June, 1907. Before however the appeal was filed, the court of first instance had carried out the order of remand, and decreed the claim on the 20th of May, 1907. Hence it is contended on behalf of the respondents that the appeal cannot be entertained. As the rulings on the point are conflicting, the case has been referred to a Full Bench.

The first question we have to determine is whether an appeal lies from an order of remand passed under section 562, of the Code of Civil Procedure, if before the filing of the appeal the suit has been decided in compliance with the order of remand. In our judgment the question must be answered in the affirmative. A party aggrieved by an order of remand has, under section 588 cl. (28) of the Code of Civil Procedure, a right of appeal from the order, and the period of limitation for such an appeal is ninety days under Art. 156 of the Second Schedule to the Indian Limitation Act. Unless therefore the law has imposed a restriction on this right, an appeal is maintainable if it is filed within the prescribed period of limitation. We are not aware of any such restriction and none has been brought to our notice. The learned Advocate for the respondent contends that where a party has two alternative remedies, and he avails himself of one of them, he cannot resort to the other, and that as the appellant has allowed the remand order to be carried out his remedy is an appeal from the ultimate decree in the case in which he can question the validity of the order of remand. This argument is in our judgment fallacious. If after the order of remand the case is tried by the court of first instance, it is so tried not at the instance of the party who is prejudiced by the order of remand but in compliance with that order. It is not in the power of that party to prevent a trial, and it cannot be said that in allowing the case to be tried he resorts to an alternative remedy in respect of the order of remand. It is true that if he can appeal to the High Court from the final decree made in the cause by the lower appellate court, he may, as held by the Full Bench

in *Rameshur Singh v. Sheodin Singh* <sup>(1)</sup>, question the legality and correctness of the order of remand, but in such an appeal the propriety of the order of remand cannot be made the sole ground of appeal. This was so held in *Sheonath Singh v. Ramdin Singh* <sup>(2)</sup>. Unless therefore he has a substantive ground of appeal to the High Court, he would have no remedy against the order of remand. The doctrine of election of remedies seems to us to have no application.

It is next urged that even if the present appeal from the order of remand be entertained, the decision in the appeal will be of no avail to the appellant as the decree passed by the court of first instance, in compliance with the order of remand, would still remain a valid decree. This appears to be the foundation of the decision of a Bench of this Court in *Salig Ram v. Brij Bilas* <sup>(3)</sup>. With great deference, we are unable to agree with the learned Judges who decided that case. After the court of first instance had once decided the case it ceased to have any jurisdiction to hear it again except on review of judgment. Its jurisdiction to hear it a second time was derived solely from the order of remand. If that order was erroneous and is set aside every thing done in pursuance of the order must fall to the ground, and be of no effect. We are in full accord with the following observations, of FIELD, J. in *Jatinga Valley Tea Co. Ltd. v. Chera Tea Co. Ltd.* <sup>(4)</sup>, which were approved of by EDGE, C. J., in *Rameshar Singh v. Sheodin Singh* <sup>(1)</sup>. FIELD, J. said "It has been contended before us that the appeal ought not to be heard. It is said that after the remand order, the Munsif proceeded to make a final decree and the existence of that final decree is a bar to the hearing of the appeal against the order of remand. We are unable to concur in this contention. The law, sub-section 28 of section 588 of the Code of Civil Procedure, expressly gives an appeal against an order under section 562, remanding a case. That provision is not in any way qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance before that appeal is preferred or comes on for hearing. We cannot therefore import into the Code a provision which does not there exist. The Munsif's jurisdiction to

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(1) [1890] I. L. R., 12 All., 510.

(2) [1896] I. L. R., 18 All., 19

(3) [1907] I. L. R., 29 All., 659.

(4) [1885] I. L. R., 12 Cal., 45

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hear the case upon remand depended upon the remand order. If the remand order were badly made, the decree and indeed all the proceedings taken under the remand order are null and void." In his judgment in *Rameshar Singh v. Sheodin Singh*, Edge, C. J., after quoting the above passage said : "I agree with every word in the passage which I have just quoted." The other learned Judges apparently agreed with him. Mahmood, J, referring to a practice prevailing in this Court under which the Court declined to try an appeal from an order of remand under section 562 on the ground that the remand order had in the meantime been already carried out observed :— "I think I must say after what the learned Chief Justice has said in his judgment in this case, that such a practice was erroneous." The learned Judge apparently referred to the rulings in *Praglal v. Raghubar Das* <sup>(1)</sup>, *Ikramunnissa v. Muhammad Wazir* <sup>(2)</sup>, and *Karori Mal v. Sahodra* <sup>(3)</sup> to which the learned Advocate for the respondents has invited our attention. It appears to us that in the opinion of the learned Judges who decided the Full Bench Case of *Rameshar Singh v. Sheodin*, the fact of a remand order having been carried into effect before the filing of an appeal from that order or before the decision of an appeal preferred from that order would not preclude the court from entertaining the appeal. The case of *Jatinga Valley Tea Co. Ltd. v. Chera Tea Co. Ltd.*, referred to above was distinguished in *Madhusudan Sen v. Kamini Kant Sen* <sup>(4)</sup>, on the ground that the appeal in that case had been filed before the remand order was carried into effect. We fail however to see how the fact of the remand order having been complied with can make any difference in principle upon the question before us. In the case last mentioned, the learned Chief Justice (Sir Francis Maclean) said "If a party desire to avail himself of the privilege conferred by section 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit." As we have pointed out above, section 588 Cl. (28) gives a right of appeal from an order of remand to be exercised within the period of limitation prescribed for such an appeal. To impose

(1) [1881] A. W. N., 174.

(2) [1882] A. W. N., 53.

(3) [1884] A. W. N., 5.

(4) [1905] I. L. R. 32 Cal., 1023.

any other limitation or restriction on the right of appeal would be to use the words of Field, J., "to import into the Code a provision which does not there exist." It often happens that an order of remand is carried out before the expiry of the period of limitation for the filing of an appeal. If the restriction contended for be imposed on the right of appeal the party affected by the remand order may, in many cases, be without a remedy. He may not have any grounds for appealing against the final decree and he cannot according to the rulings of this Court appeal only on the ground that the remand order was erroneous. In our judgment, the fact that the suit has been decided by the court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. And we agree with the ruling in *Babu Lal v. Ramkali* (2).

Turning now to the merits of the case, we are of opinion that this appeal must prevail. The plaintiff's claim for pre-emption is based on custom as recorded in the *wajibularz*. According to that document as we read it, the custom mentioned in it prevails among members of the co-parcenary body. The property sold is what is called "*arazidari*" land. It does not clearly appear what the nature of *arazidari* lands is. But after referring to various settlement reports, we find that *arazidars* are not members of the co-parcenary body. The rule of pre-emption which applies to co-parceners is not therefore applicable to them, and the plaintiff's claim must fail.

We accordingly allow the appeal, set aside the order of the court below, and restore the decree of the court of first instance. The appellant will have his costs here and in the court below.

M. L. S.

*Appeal decreed.*

(2) [1906] A. W. N., 28.

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UMAN KUARI

v.

JARBANDHAN.

*Banerji, J.*



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1908.

April, 3.

STANLEY, C. J.  
BURKITT, J.  
AIKMAN, J.

## FULL BENCH.

RAM BILAS AND ANOTHER

versus

LAL BAHADUR AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), section 584—Second appeal—Custom—question of law—insufficient or illegal evidence.*

Certain tenants transferred the sites of their houses in the village. The Zemindars sued the transferees for possession. The defendants produced several sale-deeds showing that sites of houses in the village had been formerly transferred. There was no evidence to show under what circumstances those sales were made. The *wajib-ul-ars* was silent upon the point. The courts below found that a custom had sprung up in the village whereby the tenants could transfer the sites of their houses in the village.

*Held*, that where a question arises as to the existence or non-existence of a particular custom where the lower appellate court has acted upon illegal evidence, or on evidence which was legally insufficient to establish an alleged custom, the question is one of law. *Raj Narain v. Budh Sen*, I. L. R., 27 All., 338; *Hasim Ali v. Abdul Rahman*, I. L. R., 28 All., 698, referred to.

*Per Aikman, J.*—When a tenant occupies the house in consequence of and as appertaining to his agricultural tenancy, the *onus* is on him to prove that he has a right to transfer the house-site.

APPEAL under section 10 of the Letters Patent from the judgment of GRIFFIN, J., affirming a decree of G. C. Badhwar Esq., Additional Judge of Bareilly.

The material facts appear from the judgment of Stanley, C.J.

The lower appellate court dismissed the claim. A single Judge of High Court affirmed the decree.

Plaintiffs appealed.

*R. Malcomson*, (with him *J. Simeon*, and *S. P. Ghose*), for the appellants.

*Sundar Lal*, for the respondents.

The following judgments were delivered.

*Stanley, C. J.*

STANLEY, C. J.—The defendants respondents 2 and 3 were agricultural tenants of the plaintiffs, residing in the village of Bilsanda, and as such tenants occupied the house in

\* L. P. A. 83 of 1907.

the village which is the subject matter of this litigation. This I take to be the finding of the lower appellate court. The argument before that court appears to me to have proceeded on the assumption that the vendors were such tenants of the zamindar, and the question was whether or not a custom which was set up, and to which I shall presently refer, was a binding custom. The defendants respondents 2 and 3 sold the house in question to the defendant No. 1, *together with the site*. The zamindars took exception to the sale of the site, and instituted the suit out of which this appeal has arisen for possession of the site of the house. The defence set up was that according to custom, the tenants of the village were entitled to appropriate and sell not merely the materials of their houses in the *abadi* of the village, but also the sites upon which their houses stood; that is, that they could sell the landlord's property. This contention is not supported by the *wajib-ul-arz* of 1866. In that document, provision was made whereby the tenants were permitted to sell or remove the materials of their houses, but nothing whatever is stated in it upon which could be based the suggestion that they could also sell the sites. The *wajib-ul-arz* is silent as to the sites, and from this silence I draw the inference that a tenant could not, under the *wajib-ul-arz*, sell the sites, on the principle *expressio unius exclusio alterius*. The later settlement is silent upon the question of the sale of tenants' houses, and it was the contention in the courts below that a custom has sprung up whereby tenants in the *abadi* on leaving their houses can sell and dispose of, not merely the materials of their houses, but also the sites. Instances of sales were given in evidence, and there is no doubt that a number of documents have been produced in which apparently not merely the fabric of the houses but the ground also upon which they stood was the subject of sale. We are not aware, however, of the circumstances under which these sales took place. It may be that the landlord had by express agreement with the tenants in the particular cases transferred to them the sites of their dwellings. It may be that the sales were made with the consent of the zamindars. It may be that the sales were made under some special agreement with the tenants made at the time when the occupancy of the houses began. However this may be, it seems to me that the evidence is not such as

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would justify the court in holding that so extraordinary a custom as is set up should have been recognized, and legalized in this village. In the case of *Raj Narain Mitter v. Budh Sen*<sup>(1)</sup>, my brother Knox observed in regard to evidence of this class, namely, sale-deeds and mortgages of house property in a village, that "they are at the best only evidence of so many specific instances of transfer and nothing more." Attaching as much importance to such evidence as I find myself able to do, I have come to the conclusion that, even assuming that the custom which was here set up could be upheld by a court as a valid and legal custom, the evidence in this case is wholly insufficient to establish that custom. I do not express any opinion as to whether such a custom can be regarded as a valid custom. That is a matter upon which it is unnecessary for me to express an opinion. I agree in the view expressed by my brother Richards in the case of *Hashim Ali v. Abdul Rahman* <sup>(2)</sup>, that where a question arises as to the existence or non-existence of a particular custom, where the lower appellate court has acted upon illegal evidence, or on evidence which was legally insufficient to establish an alleged custom, the question is one of law. I regard the question before the Court as one of law and not as one of fact, and therefore hold that we are entitled to consider whether the decision arrived at by the learned Judge of this Court upholding the decision of the lower appellate court was based upon sufficient evidence. I am pleased to be able to hold that the evidence was legally insufficient, as it appears to me that a grave injustice would be done if the proposition which has been advanced by the learned advocate, for the respondents in this case, could be held to be good law. I therefore would allow the appeal. I would set aside the decision of the learned Judge of this Court, and also the decision of the lower appellate court, and restore the decree of the court of first instance.

Burkitt, J.

BURKITT, J.—I am of the same opinion. I agree with the learned Chief Justice in the interpretation which he has put on the judgment of the lower appellate court, and I further fully concur with him in everything he has said as to the very peculiar custom set up by the defendants respondents in this

(1) [1905] I. L. R. 27 All., 338.

(2) [1906] I. L. R. 28 All., 698.

case. I also would restore the judgment of the court of first instance, setting aside the judgments of the learned Judge of this Court and of the lower appellate court.

AIKMAN, J.—The property in dispute in this case is situated, as is found by the learned Additional Judge, not in an ordinary agricultural village but in a town. I wish to guard myself against saying anything which might be taken as affecting the title of the residents of towns to the houses in which they live. I should have been glad to have had a clearer finding by the lower court as to the title by which the vendors of the respondent Lal Bahadur acquired the property they sold to him. But assuming that the finding of the learned Additional Judge is, as the learned Chief Justice and my brother Burkitt hold it to be, that the vendors held the property in their capacity of agricultural tenants, I agree in thinking that the evidence relied on by the courts below as proving a custom whereby such tenants could sell their houses was legally insufficient to establish such a custom. I wish to add that in my opinion, it does not follow that, because a resident of a town cultivates land belonging to the zamindar within whose zamindari the site of the town is shown as situated, it necessarily follows that he has no heritable or transferable interest in the house in the town in which he resides. But if it is shown, as I assume to be the case here, that the tenant occupies the house in consequence of and as appertaining to his agricultural tenancy, the *onus* would lie on him to prove that he had a right to transfer the house. In my opinion, in the present case this *onus* has not been discharged by the respondent. I therefore concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned Judge of this Court, and also of the lower appellate court be set aside, and the decree of the learned Munsif restored, with costs of this appeal, and also costs in the lower appellate court. We extend the time for the removal by the defendant respondent No. 1 of all the materials of the house up to the 15th of May next.

*Appeal decreed.*

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1908.

RAM BILAS

*v.*

LAL BAHADUR.

*Aikman, J.*

## PRIVY COUNCIL.

CIVIL.

1908.

May 14.

LORD  
MACNAGHTEN.  
LORD  
ATKINSON.  
SIR ANDREW  
SCOBLE.  
SIR ARTHUR  
WILSON.

RADHA PRASAD MULLICK AND OTHERS

*versus*

RANIMONI DASSI AND OTHERS.\*

*Hindu Law—Will—bequest to daughter—Intention of testator—  
construction.*

A testator bequeathed his property on the happening of certain events to his “daughters in equal shares to whom and their respective sons” he gave the same and in case any of them died childless he directed that the other daughter and her sons were to get the whole property, in case of the death of either daughter leaving sons the share of such daughter was to be paid to such her son or sons, share and share alike. *Held*, that the intention of the testator was to exclude the daughters’ daughters from inheritance and that he only gave to the daughters a life interest in the property. *Mahomed Shamsool v. Shewak Ram* L. R. 2 I. A. 7 referred to.

APPEAL from a decision of the High Court of Judicature at Fort William in Bengal. For the judgment of the High Court see I. L. R., 33 Cal., 947.

The judgment of their Lordships was delivered by

*Sir A. Scoble.*

SIR ANDREW SCOBLE.—Hurry Dass Dutt, a Hindu inhabitant of Calcutta, died on the 30th October 1875, leaving a will which was admitted to probate by the High Court on the 20th December in the same year. The will was in the English language, and was probably drawn by an English solicitor, who is one of the attesting witnesses.

The only question raised upon this appeal is as to the nature of the estate which, in the events which have happened, the testator’s daughters take under the terms of the will.

The clause of the will relating to the daughters is as follows :—

But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors, after the death of my said wife, or the death of such son after her, but under the age of eighteen years without leaving a son or sons, to

(1) L. R. 2 I. A. 7 at 14.

make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughters is to be paid to such her son or sons, share and share alike.

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RADHA PRASAD.

v.

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Str A. Scoble.

Woodroffe J., by whom the case was heard in the first instance, held that the intention of the testator was "to benefit the adopted son, and should the provisions (of the will) in this respect in any manner fail, then those who were of his own blood, *viz.*, his daughters;" that the words "and their respective sons" are used as words of limitation and not of purchase; and that upon the true construction of the will, the daughters were "each entitled to a moiety of the estate of the testator absolutely." He expressed no opinion, however, as to the right of the parties in the event of the death of one of the daughters leaving no natural son her surviving. Upon appeal to the High Court his judgment, upon these points was confirmed.

With great respect for the learned Judges in the Courts below, their Lordships are unable to concur with their decision. This is the will of a Hindu, and as observed by this Committee in the case of *Mahomed Shumsool v. Shewakram* <sup>(1)</sup> "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In spite of the assistance of his English solicitor, it appears to their Lordships that in this case the testator has clearly succeeded in showing that his daughters, whom he incontestably intended to benefit were not to have more than what is generally known to be a woman's estate in his property. This is established by the gift to them "and their respective sons," and by the proviso that in the event of one of the daughters dying

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*Sir A. Scoble.*

“without leaving any male issue surviving,” then the share of the deceased daughter is to go to the surviving daughter and her sons, to the exclusion in both cases of female issue. Moreover, “in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share alike.” No language could more clearly show that the intention of the testator was to exclude his daughters’ daughters from the succession, to which they would have been entitled under the ordinary Hindu law, if their mother’s estate had been absolute ; and the reason of this is obvious, as the sons of his daughters would be competent to offer funeral oblations to him, the strongest of all possible arguments to an orthodox Hindu.

The learned Counsel for the respondents stongly relied on Sec. 82 of the Indian Succession Act, 1865, which provides that “where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.” As already pointed out, it is abundantly clear that, under the terms of the will, only a restricted interest was intended to pass to a daughter dying without male issue.

In the opinion of their Lordships, according to the true construction of the will, the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dassi and Premmoni Dassi, are entitled to the testator’s estate in equal shares for life and with benefit of survivorship between themselves. They will humbly advise His Majesty that this appeal ought to be allowed and the decree of the High Court varied in accordance with this Judgment, and that in other respects the decree ought to be affirmed. Under the circumstances, the costs of the appeal, taxed as between solicitor and client, must be paid out of the estate.

Solicitors for the appellants : Messrs. Watkins and Lempriere.

Solicitors for the respondents : Messrs. T. L. Wilson and Co.

*Appeal decreed.*

PRIVY COUNCIL.  


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 THE BANK OF BOMBAY  
*versus*  
 SULEMAN SOMJI.

*Corporation—Share-holder—Right to inspect books and registers of the company—Mandamus—Indian Companies Act.*

The respondent, who was a share-holder in the appellant Bank, claimed an absolute and unqualified right to inspect the register of the share-holders of the Bank on the ground of generally improving the administration of the corporation's affairs:—

*Held*, that the respondent had no special interest other than or different from, that of each member of the Corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate. *Rex v. The Merchant Tailors' Co.*, 2 B and Ad., 115, referred to. "The only right the respondent can have, therefore, against the Bank in reference to such matters, is that which at common law belongs to every member of a corporation."

*Held* also that the suit was in its nature, though not in form somewhat of the character of an application for a writ of *Mandamus* and could not be sustained. One of the principles regulating the issue of the writ is that "the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the court, that he has claimed to exercise that right and none other and that his claim has been refused."

APPEAL from a judgment of the High Court at Bombay.

*Levett, K.C.*, (with him *Frank Russell, K.C.*) for the appellant.  
*De Gruyther, K. C.*, (with him *Kyffin*), for the respondent.

The judgment of their Lordships was delivered by

LORD ATKINSON.—This is an appeal from a decree, dated the 22nd January, 1907, pronounced by the High Court of Judicature at Bombay (sitting in appeal from its Original Civil Jurisdiction), by which a decree, dated the 6th August, 1906, of the High Court (sitting in its Ordinary Civil Jurisdiction) was reversed and set aside. By this latter decree the respondent's action was dismissed with costs.

The respondent is a holder of one share in the appellant Company, the Bank of Bombay, one of the Banks, incorporated in 1876 by the Indian Statute of that year entitled the Presidency Banks Act, 1876.

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June, 2.

LORD  
 MACNAGHTON.  
 LORD JAMES OF  
 HEREFORD.  
 LORD  
 ATKINSON.  
 SIR ANDREW  
 SCOBLE.  
 SIR ARTHUR  
 WILSON.

*Lord Atkinson.*



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SULEMAN SOMJI.*Lord Atkinson.*

It was suggested that the respondent purchased this share for the purpose of causing annoyance to the Bank owing to the fact that some other litigation to which he was a party had been instituted against the Bank and was still pending. There was no satisfactory evidence given to sustain this allegation.

From the correspondence which took place between the respondent and the Bank before the institution of this suit, it is, in the opinion of their Lordships, perfectly plain that the respondent claimed a right to inspect the register of the share-holders of the Bank, and to be supplied with a list of such share-holders, as absolute and unqualified as is that conferred, on the share-holders of joint stock companies in this country by section 32 of the Companies Act, 1862, or in India by section 31 of the Indian Companies Act, 1866, and section 55 of the Indian Companies Act, 1882.

It must be taken that the appellants refused to recognize this absolute and unqualified right, or to comply with the claim based upon it, but in their letter of the 21st June, 1906, which conveyed this refusal, they informed the respondent that they would be pleased to furnish him with the list he asked for, if he would satisfy them that he required it for use in his own interests as a share-holder. It is, therefore, clear that, before action brought, the qualified and restricted right to inspect and take extracts from the register contended for in argument on behalf of the respondent was never asserted, nor any limited demand based upon it ever made or refused.

In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from the register on some definite matters in which he himself was interested. He alleges therein that he had observed irregularities in the management of the Bank, in the election of its board of directors, in the advancing of large sums of money to its directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other share-holders and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and the removal of some of the directors, which he intended to propose at the general meeting of the share-holders to take place on the 9th

August, 1906. But though this is the purpose for which, and the occasion on which, he claimed the right to inspect, copy, and take extracts from the register, the decree of the Court of Appeal contains no restriction whatever. It is couched in the widest terms. It ignores both the occasion and the purpose, and declares expressly that the respondent, as long as he is a share-holder of the Bank, is entitled at all reasonable times to inspect the register of share-holders of the Bank, and to copy and take extracts from the said register, and it then proceeds to order that the Bank do give such inspection, and do allow the respondent, as long as he is a share-holder of the Bank, to take copies of and extracts from the register, and then restrains the Bank from preventing the respondent, as long as he is a share-holder of the Bank, from having access at all reasonable times to the register for the purpose of inspection and perusal, and from preventing the respondent, as long as he is a share-holder of the Bank, from taking copies of and extracts from the register.

This suit is in truth in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should, their Lordships think, apply to a great extent to the granting of the relief prayed for in such a suit as this. One of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused. Nothing less, therefore, than the absolute right claimed by the respondent in the correspondence above referred to could justify the decree appealed from in its present and unrestricted form. Now by section 231 of the above-mentioned Indian Act of 1866, and section 256 of the above-mentioned Act of 1882, the appellant Bank is expressly exempted from the operation of each of those statutes.

There is no statute conferring on the members of this corporation a right to inspect, copy, or take extracts from the register of its share-holders or any other document belonging to it. The only right the respondent can have, therefore, against the Bank in reference to such matters, is

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*Lord Atkinson.*

that which at common law belongs to every member of a corporation. Their Lordships have been referred to several authorities in which the nature, extent, and measure of this right is explained and defined.\* The learned Judges in the Bombay Court of Appeal have referred to others. The result of the authorities is summed up in their Lordships' view correctly in "Taylor on Evidence," Vol. 2, par. 1495 (10th edition, 1906) in the words following :—

"On the application of a member the King's Bench Division will, in general, grant a rule for a *limited inspection* of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested ; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded ; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object."

The strictness with which these limitations on the general and unqualified right of inspection are insisted on may be aptly illustrated by the case of *Rex v. Merchant Tailors' Co.*(<sup>1</sup>). In that case certain members of a corporation claimed the right to inspect all the documents belonging to that body on the grounds (1) that they had heard and believed the revenues of the corporation were misapplied through the malpractices of those who managed the corporation's affairs ; (2) that the fines for admitting freemen and liverymen to the corporation had been unnecessarily and improperly raised ; (3) that lavish expenditure had taken place (in some instances to the applicant's own knowledge) without the consent of the majority of the members of the corporation ; (4) that a clerk of the corporation had, as the applicants had heard and believed, recently misappropriated funds of the company to a large amount, but

\* *Rex v. The Proprietors of the Wilts and Berks Canal Navigation*, [1835] 3 A. and E. 477.

*Reg. v. Lewisham Union*, [1897] 1 Q. B., 498.

(1) [1831] 2 B. & Ad., 115.

that no accounts or information had been laid before the free-men or liverymen by which they could have ascertained the amount of the defalcations; and that they (the applicants) could not ascertain, unless they were allowed to look at the documents mentioned, whether the corporate funds had been properly applied and accounted for or not.

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BANK OF BOMBAY  
v.  
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*Lord Atkinson.*

Every member of the Corporation in this case obviously had an interest in each of the matters mentioned, but none of the applicants had in any of them any special interest different from that of his fellow members, nor had they any definite purpose, or object, in obtaining the inspection asked for other than (in the words of Littledale, J.) to see "if by possibility the company's affairs may be better administered than they think they are at present." And the writ of *mandamus* was accordingly refused in this case.

At the trial no witness other than the respondent was produced, and he was only tendered for cross-examination. He stated that he had heard through brokers that the Bank had advanced 6 lacs of rupees to three persons whom he named; that at elections the directors transferred shares to nominees who voted for them (a practice not itself illegal); that there were now only seven directors, instead of the maximum nine; that he intended to bring in two respectable people, and that he had in the correspondence given his reasons for asking *inspection*. It is clear on this evidence that the respondent had no special interest in any of the matters he complained of, or any interest other than, or different from, that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate; but that, on the contrary, his object was similar to that of the applicants in *Rex v. The Merchant Tailors' Co.*, namely, to obtain the inspection in order to communicate with the share-holders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Their Lordships think that, on this point, the case is covered by the authority of *Rex v. The Merchant Tailors' Co.*, that the respondent is not in law entitled to the extended right to which the decree declares him to be entitled, that the limited

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*Lord Atkinson.*

and qualified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon it ever refused, and they are, therefore, of opinion that the decree appealed from is erroneous and should be reversed with costs, and the Judgment and Order of Mr. Justice Scott restored. They will humbly advise His Majesty accordingly. The respondent must pay the costs of this appeal.

Solicitors for the appellant: Messrs. Cameron, Kemm & Co.

Solicitors for the respondent: Messrs. Payne and Lattey.  
*Appeal decreed.*

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May 7,

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

## HIGH COURT.

PABITRA KUNWAR

*versus*

MAHARAJA OF BENARES.\*

*Practice—First Court stopping plaintiff's evidence—Appellate Court, procedure of.—When it thinks evidence insufficient—Remand.*

A Munsif treating a case as undefended stopped the plaintiff from producing all the available evidence. The Judge in appeal treating the evidence as insufficient dismissed the suit. *Held*, that the proper course was to remand the case to the first court, in order that it may give the plaintiff an opportunity of producing his evidence, *Kalian Prasad v. Bishnath*, A. W. N., 1905, p. 266, followed.

SECOND APPEAL against the decree of G. A. Paterson Esq, District Judge of Benares, reversing a decree of Babu Hira Lal Singh, Munsif.

Suit to recover a sum of money.

The facts material for the purposes of this report appear from the judgment.

*Surendra Nath Sen*, (for *S. C. Banerji*), for the appellant.

*W. K. Porter* (with him *Gokul Prasad* and *Satya Chandra Mukerji*), for the respondent.

The judgment of the Court was delivered by

\*S. A. 685 of 1907.

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1908.

PABITRA KUNWAR  
v.MAHARAJA OF  
BENARES.

Stanley, C. J.

STANLEY, C. J.—We think that the learned District Judge was wrong in dismissing the plaintiff's suit, without first giving him an opportunity of examining all the witnesses whom he was prepared to examine before the court of first instance. It appears that by reason of default of the defendant in complying with the order of the court, his defence was struck out, and the suit was heard *ex parte*. Before the plaintiff had examined all his witnesses, the Munsif intimated that inasmuch as the case was undefended, there was sufficient evidence already on the record, and passed a decree in favour of the plaintiff. On appeal, the learned District Judge was not satisfied that the evidence on the record was sufficient to establish the plaintiff's claim. A representation was made to him that all the evidence which was available had not been produced by the plaintiff before the Munsif. In view of this, we think that the learned District Judge ought not to have dismissed the plaintiff's suit, but ought to have remanded the suit to the court of first instance with directions that it be retried, an opportunity being given to the plaintiff of examining his witnesses, and adducing all his evidence. This was the course which was adopted in *Kifayatullah Mondal v. Sakina Bibi* (1). It is supported by the decision of a Bench of this Court in *Kalian Prasad v. Bishnath* (2). We therefore allow the appeal. We set aside the decrees of both the lower courts, and we remand the suit through the lower appellate court to the court of first instance with directions that it be reinstituted in the file of pending suits in its original number, and be disposed of on the merits, costs here and hitherto, including fees in this Court on the higher scale, will abide the event.

*Appeal decreed.*

(1) [1897] W. N. Cal., vol II, p. 92 of the Notes.

(2) [1905] A. W. N., 266.

CIVIL.

1908.

April, 8.

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

## TASADUK HUSAIN KHAN AND OTHERS

versus

## ALI HUSAIN KHAN AND OTHERS.\*

*Pre-emption—Wajib-ul-arz—Custom or contract—Construction.*

A *wajib-ul-arz* provided that "no pre-emption suit has as yet been brought or decided. We agree that the custom of right of pre-emption should prevail in future (*aenda jari rakhna manzur hai*).<sup>n</sup> In the *wajib-ul-arz* prepared at the subsequent settlement, no such clause was inserted. *Held*, that the record was a record of contract and not a record of pre-existing custom and came to an end with the subsequent settlement. *Sewak Singh v. Girja Pande*, 2 A. L. J. R., 6, distinguished.

FIRST APPEAL against the decree of Pandit Pitambar Joshi, Subordinate Judge of Bareilly.

Suit for pre-emption.

The Court of first instance decreed the suit.

Defendants appealed.

*B. E. O'Connor*, (with him *Mohammad Ishaq*), for the appellants.

*Ghulam Mujtaba*, (with him *L. M. Banerji*), for the respondents.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—This appeal arises out of a suit for pre-emption, and the sole question for our determination is whether or not the right of pre-emption embodied in the *wajib-ul-arz* of the village of the year 1872 was a right existing by custom or a right established between the parties by special agreement. If it was a right arising by contract then the contract came to an end at the termination of that settlement. The recent settlement is silent altogether as to the existence of any right of pre-emption, whether by contract or by custom. Consequently the plaintiffs were obliged to rely upon the *wajib-ul-arz* of 1872 as embodying a right existing by custom. The learned Subordinate Judge came to the

\*F. A. No. 130 of 1906.

conclusion that the right referred to in that *wajib-ul-arz* was a right existing by custom. We have to see whether or not upon the true interpretation of the document this decision is well founded. In the *wajib-ul-arz* the names of the zemindars are set forth as also the owners of resumed lands, and these parties make the declarations which are afterwards set forth.

Chapter II deals with the rights of co-sharers, either based on custom or on some special agreement and paragraph 8 of that chapter is entitled. "As to the transfer of property by sale, mortgage, gift or inheritance, and practice of pre-emption." The words which we translate as "practice of pre-emption" being "*rasm shufa*." The paragraph then begins thus "at present no portion of the share of any co-sharer has been transferred by mortgage. Every co-sharer, with the exception of Musammat Jamil-un-nissa and Alim-un-nissa, whose shares are in the possession of Ahmad Husain and Barkat Ali, is at liberty to transfer the whole or part of his share in future. No pre-emption suit has as yet been brought or decided. We agree that the custom of the right of pre-emption should prevail in future," the words being "*Aenda jari rakhna rawaj haq shufa ka manzur hai*." The meaning of this we take to be, that the co-sharers 'wished to give currency to the right of pre-emption in future.' The learned Subordinate Judge translated these words as follows "No pre-emption suit has been instituted and decided up to this, but it is desirable to continue the custom of pre-emption in future." He overlooks as it appears to us the important word "haq" introduced between "*rawaj*" and "*shufa*." We are of opinion in view of the language of the *wajib-ul-arz* that the co-owners did not intend to convey by the language which they used that they wished to keep alive a subsisting custom of pre-emption but merely expressed a desire that in future, that is during the currency of the settlement, a right to pre-empt, as subsequently defined should prevail. This therefore was a right arising from contract and not a right existing by custom. We do not think that the case is governed by the ruling in *Sewak Singh v. Girja Pande* <sup>(1)</sup>. The language in the *wajib-ul-arz* in that case is distinguishable from that now before us. Every question of the kind must be governed by the language

(1) [1905] 2 A. L. J. R., 6.

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which is to be found in the documents under which the rights of the kind arose and the case-law rarely gives much assistance to the court in determining such a question. We therefore allow the appeal. We set aside the decree of the learned Subordinate Judge, and dismiss the plaintiff's suit with costs in both courts, including fees in this Court on the higher scale.

*Appeal allowed.*

CIVIL.

1908.

May, 15.

STANLEY, C. J.  
BANERJI, J.

GHULAM ABBAS

versus

ABDULLA KHAN.\*

*N. W. P. Rent Act (XII of 1881), section 174—Lease by Collector—Proceedings commenced before the passing of Act II of 1901—termination of.*

In executing a decree of a Rent Court, the Collector, purporting to act under section 174 of the N. W. P. Rent Act, made a lease of the property of the judgment-debtor, after the passing of the Tenancy Act II of 1901. In a suit brought to set aside the lease, held that the execution proceedings having commenced before the passing of the new Act should have been completed under that Act and the Collector could grant a lease of the property instead of selling it.

SECOND APPEAL against the decree of W. R. G. Moir Esq., District Judge of Jaunpur, reversing a decree of Mautvi Saiyed Zainul Abdin, Subordinate Judge.

Suit for possession and cancellation of a lease.

The material facts appear from the judgment.

The court of first instance decreed the suit but the lower appellate court reversed the decree.

Plaintiff appealed.

*M. Ishaq Khan*, for the appellant.

*Tej Bahadur Sapru* (with him *Mohammad Ishaq*), for the respondents.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—The facts which have given rise to the suit in this case are these. One Asghar Husain obtained a decree for rent against the appellant on the 23rd of March, 1899. On the 11th of July, 1901, the decree-holder applied for execution of the decree. On the 18th of October, 1902, the Collector of the District, to whom the execution of the decree had been transferred, purporting to act under section 174 of Act XII of 1881 directed a lease for 11 years to be granted to Abdullah, the defendant. The present suit was brought to have this lease cancelled and for a decree for

\* S. A. No. 134 of 1907.

possession of the property comprised in the lease, as well as for mesne profits. The court of first instance decreed the claim but the lower appellate court has reversed this decree. The plaintiff has preferred this appeal, and he contends that as after the passing of the Agra Tenancy Act No. II of 1901, the Collector ceased to have any power to grant a lease, he acted *ultra vires* in granting it. It is further contended that under section 174 of Act XII of 1881, the lease could not be granted as the property which was sought to be sold in execution of the decree was not a *mahal* within the meaning of that Act.

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GHULAM ABBAS

vs.

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*Banerji, J.*

As regards the first objection, the provisions of section 11 of Act No. I of 1887 of the Local Council saved the operation of Act No. II of 1901 as regards the execution proceedings, which were commenced before the passing of that Act. The section provides that the repeal of any Act or Regulation shall not affect any proceedings commenced before the repealing Act shall come into operation and the proceedings shall be continued and concluded as if the repealing Act had not been passed. The proceedings relating to the execution of the decree passed against the appellant had commenced under Act No. XII of 1881. The repealing of that Act during the continuance of those proceedings could not affect the proceedings which were already commenced and they had to be continued and concluded under that Act. The granting of a lease, under the provisions of section 174 of Act XII of 1881, is a part of the proceedings relating to the execution of a decree. Therefore the Collector was competent, instead of selling the property, to grant a lease under section 174.

As regards the plea that the property was not a *mahal* the learned Judge of the court below finds that "the *mahal*, of which the plaintiff respondent owns a *patti* is held under a separate engagement for the payment of land revenue, and has a separate record of rights framed for it, and therefore accords with the definition of a *mahal*." This finding of the learned Judge is conclusive against the appellant. The result is that we dismiss the appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

CIVIL.

1908.

May, 15.

STANLEY, C. J.  
BANERJI, J.

## UMMI BEGAM

versus

## KESHO DAS.\*

*Mahomedan Law—Defacto guardian—Mother—transfer by—Lunatic's benefit—Setting aside of transaction.*

When a Mahomedan mother acting as a *defacto* guardian of her son who is a lunatic, deals with his property on his behalf and for his benefit, the transaction should not be set aside, although under the Mahomedan Law she cannot be his guardian. *Mafazzal Hosain v. Basid*, I. L. R., 34 Cal., 36, *Ramcharan v. Anukul-chandra*, I. L. R., 34 Cal., 65, *Majidan v. Ram Narain*, I. L. R., 26 All., 22, referred to.

SECOND APPEAL against the decree of Austin Kendall, Esq., Additional Judge of Meerut, reversing a decree of H. David Esq., Subordinate Judge.

Suit for possession of certain land.

The material facts appear from the judgment.

The court of first instance decreed the claim. The lower appellate court reversed the decree.

Plaintiff appealed.

*M. Ishaq Khan* (with him *J. N. Mukerji*), for the appellant.

*M. L. Agarwala* (with him *S. C. Banerji*), for the respondent.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—The appellant is the daughter of one Mahmud Husain, who was a lunatic. She brought the suit out of which this appeal has arisen for possession of her share of the site of a house now in the possession of the defendant. Mahmud Husain, as we have said above, was a lunatic. On the 22nd of June, 1867, his wife and mother executed a sale-deed in respect of the land now in suit. The purchaser, under that sale, sold his rights to the defendant's father on the 19th of May, 1877. After his purchase, a house was built by the purchaser on the land, and it is alleged that the house is of considerable value. The present suit was brought by

\* S. A. No. 790 of 1907.

the plaintiff on the last day of the expiry of the limitation, calculated from the date of the lunatic's death. The court below has found that the sale was effected by the mother and wife of the lunatic as his *defacto* guardians, and that the sale was for the benefit of the lunatic, debts due by him having been discharged with the proceeds of the sale. It is contended that the mother and the wife were not the legal guardians of the lunatic under the Mahomedan Law, and it is urged that they had no power to sell the lunatic's property. It is true that under the Mahomedan Law, a mother is not the legal guardian of the property of her minor son, but it has been held that when she acting as *defacto* guardian deals with the property, the transaction, if it is for the benefit of the minor, ought to stand. We may refer to the rulings of the Calcutta High Court in *Mafazzal Hosain v. Basid Sheikh* <sup>(1)</sup>, and *Ram Charan Sanyal v. Anukul Chandra Acharjya* <sup>(2)</sup>, and to the ruling of this Court in *Majidan v. Ram Narain* <sup>(3)</sup>. In our judgment, the decision of the court below is right. We accordingly dismiss the appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

(1) [1906] I. L. R., 34 Cal., 36.

(2) [1906] I. L. R., 34 Cal., 65.

(3) [1903] I. L. R., 26 All., 22.

## GENDO

*versus*

## NEHAL KUNWAR.\*

*Code of Civil Procedure (Act XIV of 1882), sections 244, 258—Payment twice over—Suit for recovery of that amount—Maintainable.*

Sections 244 and 258 of the Code of Civil Procedure do not preclude the institution of a suit by a judgment-debtor for recovery of money, which he had paid to the decree-holder privately and the payment of which, not being certified, could not be recognised, and for which the decree-holder had taken out execution over again. *Shadi v. Ganga Sahai*, I. L. R., 3 All., 538; *Periatambi Undayan v. Vellaya*, I. L. R., 21 Mad., 409, followed.

SECOND APPEAL against the decree of Austin Kendall Esq., Additional Judge of Meerut, reversing a decree of Munshi Banke Behari Lal, Munsif.

\*S. A. 383 of 1907.

CIVIL.

1908.

UMMI BEGAM

*v.*

KESHO DAS.

*Banerji, J.*

CIVIL.

1908.

May, 16.

STANLEY, C. J.  
BANERJI, J.

CIVIL.

1908.

GENDO

v.

NEHAL KUNWAR.

Suit for money.

The material facts appear from the judgment.

*Lalit Mohan Banerji* (with him *S. C. Banerji*), for the appellant.*M. L. Agarwala* (with him *Girdhari Lal Agarwala*), for the respondent.

The judgment of the Court was delivered by

*Stanley C. J.*

STANLEY, C. J.—This was a case for the recovery of a sum of Rs. 634-7, and interest which is alleged to have been paid by the plaintiff to the ancestors of the defendant in satisfaction of the balance due on a decree held by them and which was not so applied. The facts leading up to it are these. On the 18th of February, 1902, Ram Prasad and Tulshi Ram, the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020, due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March, 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750, by the mortgagor without interest within a year, the suit should not be pressed, but in default of payment of that amount, the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present suit deposited a sum of Rs. 1,750, on the 20th of March, 1903, which was a day late, and this sum was paid out to Ram Prasad and Tulshi Ram. On the 1st of April, 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs. 2375. Again a settlement was come to out of court on the 4th of May, 1903, the plaintiff paying a sum of Rs. 634-7 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders on the 19th of May, 1903, obtained an order absolute under section 89. Ram Prasad and Tulshi Ram are dead and the defendant is their heir. On the 26th of February, 1906, the defendant took out execution of the decree, and the plaintiff thereupon filed objections alleging that she had paid the amount due and stating that she held a receipt for it. This objection was overruled on the ground that the payment had not been certified under section 258 of the Code of Civil Procedure and on the ground that her appli-

cation was beyond time. Thereupon the present suit was instituted. It is stated and it is not denied, that the property of the plaintiff has been sold in execution of the decree, and the entire amount payable to the defendant has been realized by the sale. The question then is whether or not the plaintiff has any remedy in respect of the sum of Rs. 634-7 which was paid to Ram Prasad and Tulshi Ram for the purpose of satisfying the balance due at the time or must submit to the payment of this amount twice over. We think that the lower appellate court rightly decided that neither section 244 or section 258 of the Code precludes the institution of a suit such as this and we are supported in this view by several authorities. One is a case of this Court, of *Shadi v. Ganga Sahai* <sup>(1)</sup> which is on all fours with the case before us. Another is the case of *Peritambi Udayan v. Vellaya Goundan* <sup>(2)</sup>. The same point was decided similarly in this case. We agree with those decisions, and dismiss the appeal with costs, including fees in this Court on the higher scale.

*Appeal dismissed.*

(1) [1881] I. L. R., 3 All., 538.      (2) [1897] I. L. R., 21 Mad., 409.

## GHASITEY

*versus*

## GOBIND DAS AND OTHERS.\*

*Transfer of Property Act (IV of 1882), section 52—Lis pendens—sale during the pendency of suit—Service of summons not effected—effect of.*

When after the institution of a suit for pre-emption, the vendee sells the property the sale cannot, having regard to the provisions of section 52, Transfer of Property Act, affect the right of the plaintiff, to the decree which he might have obtained in the suit, as the purchaser takes the property subject to the result of the suit. *Manpal v. Sahib Ram*, I. L. R., 27 All., 544, distinguished. The fact that the vendee sells the property before service of summons does not make section 52 inapplicable. *Faiyaz Husain v. Prag Narain*, I. L. R., 29 All., 339, referred to.

SECOND APPEAL against the decree of L. Marshall Esq., District Judge of Banda, confirming a decree of Maulvi Saiyid Hamid Hasan, Munsif of Hamirpur.

\* S. A. No. 244 of 1907.

CIVIL.

1908.

GANDO

v.

NEHAL KUMWAR.

Stanley, C. J.

CIVIL.

1908.

May, 21.

STANLEY, C. J.  
BANERJI, J.

CIVIL.

1908.

GHASITEY

v.

GOBIND DAS.

Suit for pre-emption.

The material facts and arguments appear from the judgment. The Courts below decreed the suit.

Defendant appealed.

*S. C. Chaudhri* (for *J. N. Chaudri*), for the appellant.

*Muhammad Raoof*, for the respondents.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J. This appeal arises in a suit for pre-emption brought under the following circumstances. One Janki Das sold his share in certain property, on the 10th of July, 1905, to Baij Nath who is a stranger. On the 1st of June, 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June, 1906, before the summons in the suit was served on Baij Nath, the latter sold the property to Ghasitey, who is a co-sharer of equal degree with the plaintiff in the village. It is not disputed that the plaintiff has no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff which found favour with the court below was that having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption. Ghasitey, we may mention, was added as a defendant by the order of the court and not on the application of the plaintiff. The plaint was not amended, and the plaintiff did not seek to pre-empt the sale, made in his favour. The claim was decreed by the court of first instance, and the decree of that court was affirmed by the lower appellate court.

It is urged before us that the rule of *lis pendens* cannot apply to the present case, and that as the right of Ghasitey was not inferior to that of the plaintiff, the suit ought to have been dismissed. In our judgment, this contention is not well founded. It has been held by the Privy Council in the recent case of *Faiyaz Husain Khan v. Prag Narain*,<sup>(1)</sup> that where a suit is contentious in its origin and nature, it is not necessary that the summons should have been served in the suit, in order to make it a contentious one, within the mean-

(1) [1907] I. L. R., 29 All., 339.

ing of section 52 of the Transfer of Property Act, and to render the doctrine of *lis pendens* applicable. The fact therefore of the purchase by Ghasitey having been made before the service of summons, does not make section 52 of the Transfer of Property Act inapplicable. That section provides that during the active prosecution of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with, by any party to the suit or proceeding, so as to affect the rights of any other party there-to under any decree or order which might be made therein. Had the sale in favour of Ghasitey not been effected, the plaintiff would have got a decree for pre-emption as against the original vendee, Baij Nath. As the purchase by Ghasitey was made after the institution of the plaintiff's suit, this purchase cannot having regard to the provisions of section 52, affect the right of the plaintiff under the decree which he might have obtained in the suit. Had the sale been made before the institution of the suit, the result would have been different, because at the date of the institution of the suit, the plaintiff would have had no right preferential to that of the purchaser then holding the property. Where, however, after the institution of the suit for pre-emption a sale is made, that sale cannot affect the right of the plaintiff to the decree which he might have obtained in the suit as the purchaser takes the property subject to the result of the suit. The case of *Manpal v. Sahib Ram* <sup>(1)</sup> referred to by the learned Vakil for the appellant, is distinguishable. There the plaintiff amended his plaint, made the second purchaser of the property a defendant to the suit, and raised the issue of his title to pre-empt as against that purchaser. It was held that after having gone to trial upon that issue, he could not take shelter under the provisions of section 52. That is not the case here. In the present suit, the sale was made, as we have said above, some days after the institution of the suit. For these reasons we dismiss the appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

(1) [1905] I. L. R., 27 All., 544.

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CIVIL.

1908.

May, 22.

STANLEY, C. J.  
BANERJI, J.

## MUL KUNWAR AND OTHERS •

versus

## CHATAR SINGH.\*

*Limitation Act (XV of 1877), sch. II, Art. 97, 116—Vendor and purchaser—Breach of covenant—Refund of consideration—*

The defendant sold to the plaintiff half of a village, on 16th September, 1899. In respect of  $\frac{1}{4}$  of that share one Nangi was recorded in possession in lieu of maintenance. The plaintiff purchased with knowledge of her rights and obtained a relinquishment from her. The courts, in spite of the relinquishment, refused to record the name of the plaintiff. The plaintiff brought a suit for possession against Nangi, but that suit was dismissed on 23rd November, 1900. The plaintiff brought the present suit for recovery of proportionate amount of sale consideration and damages on 9th July, 1904. Among other covenants there was one to the following effect. *Agar kisi wajah se mushtari ko kabza na mile to woh nalish karke kabza le le aur main zimmedar harja aur kharcha ku hounge.* Held, that that was a covenant for title and the defendant was liable to refund the proportionate amount of sale consideration. Held, further that the suit was for compensation for breach of covenant and the suit was not governed by article 97 but by article 116, Limitation Act, sch. II.

SECOND APPEAL against the decree of H. J. Bell Esq., District Judge Aligarh confirming a decree of Pandit Pitamber Joshi Subordinate Judge.

Suit for money for partial failure of consideration.

The facts of the case were as follows :—

Two brothers, Dip Chand and Lajja Ram were original owners of mauza Kampthal. Dip Chand died in 1876. His share was recorded in the names of his two sons Kanahialal and Makhanlal, and his widow Nangi. Lajja Ram died in 1885 and his share devolved on Kanahialal and Makhanlal, the widow not getting anything as the family was held to be joint. Kanahialal and Mul Kuar (Makhanlal's widow) sold mauza Kampthal  $\frac{1}{2}$  each under two deeds to plaintiff, Chatar Singh. Kanahialal's deed was dated 10th January, 1899, and Mul Kuar's deed was dated 16th September, 1898.

\*S. A. No. 296 of 1907.

In each of the sale deeds a clause to the following effect was inserted.

*"Hakiat mubayya har tareh ke mastalbe aur muakhza se pak aur saf hai.....main agar dakhil kharid na karaun ya harij dakhil mushtari ka houn ya aur kisi wajah se mushtari ko dakhil na mile to us halat men mushtari ko ikhtiar hoga ke charajoi adalat majaz se kare aur dakhil ho aur uska kharcha aur harja mai sud fi sadi Re. 1 mahwari ke mere zat aur digar jaedud se hasb zabta wasul kare."*

The plaintiff obtained a deed of relinquishment from Nangi on the 6th of April, 1899, but his application for mutation of names was rejected on the 16th August, 1891, on the ground that the deed was without consideration. He brought a suit for possession against her, and that suit was dismissed on the 23rd of November, 1900, by the court of first instance, and on the 12th June, 1901, by the appellate court. He then brought the present suit for "recovery of a proportionate share of the sale consideration against the vendor. The courts below decreed the suit.

Defendant appealed.

*Mohan Lal Nehru* (with him *Satish Chandra Banerji*), for the appellant, submitted that the suit being one for partial failure of consideration was governed by article 97 of the Limitation Act. It should have been brought within three years from the date when the consideration failed. The consideration failed when the plaintiffs' application for mutation was rejected and at the latest when his suit for possession was dismissed. He relied on

*Bulchand v. Parmanand*, [1901] A. W. N., 24.

On the merits he submitted that the courts below having found that the plaintiff knew of Nangi's claim long before his purchase, he was not entitled to maintain a suit for failure of consideration specially when there was no covenant to repay.

*Surendra Nath Sen* (with him *Parbati Charan Chatterji* and *Gulzari Lal*), for the respondent, submitted that the suit was one for compensation for breach of a covenant in the sale deed and was governed by article 116 and not by article 97. The period of limitation for such a suit being six years the suit was amply within time. He cited

*Amanat Bibi v. Ajudhia*, [1895] I. L. R., 18 All., 160.

*Kotappa v. Vallur*, [1901] I. L. R., 25 Mad., 50.

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Even if article 97 governed the suit it was within time as it was brought within three years of Nangi's claim for profits of her share against the plaintiff. The case of *Bulchand* was distinguished in.

*Ramchandrar v. Tohfah*, [1904] I. L. R., 26 All., 519.

The words "*aur kisi wajah se*" in the covenant showed that the parties contemplated dispossession of the plaintiff at the instance of Nangi.

*Mohan Lal Nehru*, in reply distinguished the cases cited and submitted that the covenant was that the plaintiff could recover the damages and costs of the suit which he might institute for possession.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—The suit which has given rise to this appeal was brought under the following circumstances:—Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons Kanhaiya Lal and Makhan Lal and a widow Musammat Nangi. The names of these persons were entered in the revenue records in regard to his half share of the property. Lajja Ram died in 1885. His share devolved on his nephews, Makhan Lal and Kanhaiya Lal. Makhan Lal died leaving a minor son, Ghansham Das. and a widow, Musammat Mul Kunwar. On the 16th of September, 1898, Mul Kunwar sold one-half of the property to the plaintiff. On the 10th of January, 1899, Kanhaiya Lal sold the other half. The plaintiff applied for the entry of his name in respect of the entire village, but his application was rejected on the 16th of August, 1899, as regards the share which was recorded in the name of Musammat Nangi, the widow of Dip Chand. The plaintiff then sued for a declaration of his right and for possession against Nangi, but that suit was dismissed on the 23rd of November, 1900. On the 9th of July, 1904, he brought the present suit against Musammat Mul Kunwar and her minor son, Ghansham Das, as the principal defendants, and he claimed the following reliefs. (1) that possession be awarded over the property, (2) that if possession be not awarded, a proportionate part of the consideration for the sale with interest be awarded to him, and in case the first relief was granted, that he might be awarded further damages.

The court of first instance granted the second prayer in the plaint, and the decree of that Court has been affirmed by the lower appellate court.

The defendants have preferred this appeal, and the first contention raised on their behalf is that the claim is barred by limitation. We may observe that this plea was not set up in either of the courts below. The contention is that the suit is one for money paid on an existing consideration which has failed, and that therefore article 97 of Schedule II of the Limitation Act applies, and, as the suit was brought after three years from the date on which the plaintiff's suit against Musammat Nangi was dismissed, this claim is time-barred. We do not think this contention is right. The claim is upon a covenant contained in the sale-deed, that covenant being to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. Now this is clearly a suit on that covenant, and for the breach of it, namely, the failure of the defendants to put the plaintiff into possession of the share of the property sold which was recorded in the name of Musammat Nangi. The claim therefore was clearly one governed by article 116 of schedule II, as the sale-deed was a registered instrument.

The next contention is that under the covenant, the plaintiff was not entitled to any refund, as he was aware of the title set up by Musammat Nangi at the time of his purchase. This contention also has in our judgment no force. The parties were probably aware of the fact that a part of the property was entered in the name of Musammat Nangi, and it was apparently for that reason that the purchaser took the covenant from the vendor to which we have referred above, which is an absolute covenant.

For these reasons we think the courts below were right, and we dismiss the appeal with costs.

X.

*Appeal dismissed.*

CIVIL.

1908.

MUL KUNWAR  
v.

CHATAR SINGH.

*Banerji, J.*

CIVIL.

1908.

June, 22.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

RAM JAGGI RAI

versus

KAULESHAR RAI.\*

*Limitation Act (XV of 1877), articles 97, 116—Breach of covenant—Dispossession of the vendee—Return of sale consideration—Registered sale-deed.*

A sale-deed set out that the property sold was unincumbered and there was a covenant that if the vendee was dispossessed from any portion of the property, the vendors would repay a proportionate part of the sale price. The vendee was dispossessed from a portion of the property by a prior incumbrancer. *Held*, that article 116 and not 97 Sch. II., of the Limitation Act governed the suit and the suit could be brought within 6 years from the date of dispossession. *Mul Kunwar v. Chatar Singh*, 5 A. L. J. R., 410, followed; *Tulshi Ram v. Murli Dhar*, I. L. R., 26 Bom., 750, referred to.

FIRST APPEAL from an order of Babu Sris Chandra Bose, Subordinate Judge of Ghazipur, reversing a decree of the Munsif.

Suit for money.

The court of first instance dismissed the suit but the lower appellate court reversed the decree.

Defendant appealed.

*M. L. Agarwala*, for the appellant.

*Sital Prasad Ghose* (with him *Balram Chandra Mukerji*), for the respondent.

The judgment of the Court was delivered by

AIKMAN J.—The plaintiff, who is respondent here, purchased certain landed property from the defendants. The sale deed set out that the property was unincumbered. It contained a covenant that if the vendee should be dispossessed of any portion of it the vendors would repay a proportionate amount of the sale price with interest at 2 per cent. In consequence of a decree obtained by a prior incumbrancer, the plaintiff was dispossessed of a portion of the property on the 8th of April, 1904. On the 14th of July, 1907,

F. A. F. O., 38 of 1908.

he filed the suit in which this appeal arises, to recover from the defendants the proportionate value of the share of the property of which he had been dispossessed, together with interest. The court of first instance dismissed the suit, holding that it fell within article 97 of schedule II of the Limitation Act, which provides a period of three years for a suit to recover money paid upon an existing consideration which afterwards fails, the time from which the period begins to run being the date of failure. The plaintiff appealed. The learned Subordinate Judge allowed the appeal, and remanded the case under section 562 of the Code of Civil Procedure for decision on the merits. Against that order of remand, the present appeal has been preferred. The learned Subordinate Judge was of opinion that the suit fell within article 116 of the Second Schedule, which allows six years for a suit for compensation for the breach of a contract in writing and registered. We are clearly of opinion that the suit does fall within that article, and that the view taken by the learned Subordinate Judge is right. The cases cited by the learned Counsel for the appellants, namely, *Ramchandra Singh v. Tohfa Bharti* <sup>(1)</sup>, and *Hanuman Kamat v. Hanuman Mandur* <sup>(2)</sup>, are clearly distinguishable. In the case of *Tulshi Ram v. Murlidhar Chaturbhuj Marwadi* <sup>(3)</sup>, it was argued for the appellant, whose suit had been dismissed as barred by limitation, that even if article 116 applied, the suit was time barred. The learned Judges did not touch on this plea at all. The decision of the court below is in accordance with a recent decision of this Court, *Mul Kunwar v. Chutar Singh* <sup>(4)</sup>. It was there held that a similar suit to the present "was clearly one governed by article 116 of schedule II, as the sale-deed was a registered instrument." For the above reasons, we are of opinion that the appeal fails, and it is dismissed with costs.

*Appeal dismissed.*

(1) [1904] I. L. R., 26 All., 519.

(2) [1891] I. L. R., 19 Cal., 123.

(3) [1902] I. L. R., 26 Bom., 750.

(4) Since reported 5 A. L. J. R., 480.

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1908.

RAM JAGGI RAI  
v.  
KAULESHAR RAI.

*Aikman, J.*

CIVIL.

1908.

May, 22.

STANLEY, C. J.  
BANERJI, J.

## THE COLLECTOR OF MIRZAPUR

versus

DAWAN SINGH AND OTHERS.\*

*Limitation Act (XV of 1877), article 116, Sch. II—Covenant to deliver possession—Possession not given—Suit for money—Compensation for breach of covenant.*

The defendants executed a bond hypothecating the mortgagee rights in certain property. There was a covenant that the mortgagee will be entitled to recover his money if possession was not delivered. More than three years after the execution, the mortgagee brought this suit for recovery of money. *Held*, that the suit, in effect, was a suit for compensation for breach of contract and was governed by Article 116 of the Limitation Act. *Rum Narain v. Kamta Singh*, I. L. R., 26 All., 138, distinguished.

SECOND APPEAL against the decree of Saiyid Muhammad Ali Esq., District Judge of Mirzapur, modifying a decree of Shah Amjadullah, Subordinate Judge.

Suit to recover a sum of money.

The material facts appear from the judgment.

The court of first instance decreed the claim. The lower appellate court modified the decree.

Plaintiff appealed.

*A. E. Ryves*, for the appellant.

*Muhammad Raoof*, for the respondents.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff appellant to recover the amount of a mortgage bond, dated the 17th of April, 1899. It was a registered document and provided that the amount secured by it should be paid by instalments, and that in case of default, the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent, from the date of the cause of action till repayment, either from the person or from the property, moveable or immoveable of the debtor,

\* S. A. No. 10 of 1907.

or from the property mortgaged. The first instalment was payable on the 16th of December, 1899. The present suit was brought on the 15th of December, 1905. The court below has dismissed the suit, holding it to be barred by limitation, and has referred to the case of *Ram Narain v. Kamta Singh* (1), as an authority in support of its view. That ruling in our opinion has no bearing whatever on the present case. That was a suit for arrears of rent for which there is specific provision in Schedule II of the Limitation Act. The present suit is one for money payable under a mortgage bond. As the property mortgaged consisted of mortgagee rights, it was assumed according to the ruling in force at the time when the suit was brought, that the mortgaged property could not be sold, but there is the clear covenant in the bond that the money would be recoverable, in case of default in delivering possession, from the person and other property of the mortgagors. This was in our opinion a suit which was governed by Article 116 of Schedule II, being in substance a suit for compensation for breach of contract, namely, the contract to deliver possession and pay the amount secured by the bond, in case of default in delivering possession. The bond being a registered instrument the period of limitation under that article was six years, and the suit was therefore within time. This view is in consonance with the ruling of a Full Bench of this Court in *Husain Ali Khan v. Hafiz Ali Khan* (2). The result is that we allow the appeal, set aside the decree of the court below, and restore that of the court of first instance with costs in all courts, including fees in this Court on the higher scale.

*Appeal decreed.*

(1) [1903] I. L. R., 26 All., 138.

(2) [1881] I. L. R., 3 All., 600.

CIVIL.

1908.

COLLECTOR OF  
MIRZAPUR

*v.*  
DAWAN SINGH.

*Banerji J.*



CRIMINAL.

1908.

May, 4.

KNOX, J.

RAM BILAS

*versus*

KING EMPEROR.\*

*Criminal Procedure Code (Act V of 1898), section 133—Application for jury—Verdict binding.*

One *R.* was called upon under section 133 of the Criminal Procedure Code to show cause why an obstruction should not be removed from a public way. His mukhtar-i-am appeared and nominated certain persons to be jurors who were accepted by the Magistrate. They passed a verdict against *R. viz.*, that the land obstructed was a public way. *Held*, that the objection was such as could be left to the jury to decide. *Kailash Chunder v. Ramlal*, I. L. R., 26 Cal., 869, referred to.

A person who applies for a jury is bound by the verdict of the jury and cannot raise a plea that the obstruction was caused in the exercise of a *bona fide* claim of right. *In the matter of the petition of Lachman*, A. W. N., 1900, 180, referred to.

APPLICATION to revise an order of Babu Ram Ratan Lal, Magistrate of the first class of Deoria, District Gorakhpur, under section 133 of the Code of Criminal Procedure.

The facts appear from the judgment.

*Ross Alston*, for the petitioner.

*W. K. Porter*, the Assistant Government Advocate, for the Crown.

The following judgment was delivered by

Knox, J.

KNOX, J.—The applicant in this case is one Ram Bilas. The said Ram Bilas is the owner of a firm which has a shop situate in Barauli Bazar in the district of Gorakhpur.

According to an affidavit, dated the 9th of March, 1908, and filed in these proceedings, Ram Bilas resides in the Jaipur State and his firm at Barauli, known as the firm of Ram Karan, Ram Bilas, is in the hands of managers.

The Sub-Divisional Magistrate being of opinion that a chabutra attached to the premises of Ram Karan, Ram Bilas was an unlawful obstruction which should be removed from a road used by the public, issued a notice upon Ram Bilas calling upon him to appear and show cause why the obstruction

\* Criminal Revision No. 59 of 1908.

should not be removed. This notice is dated the 17th of August, 1907, and bears an endorsement which is said to be an endorsement by Makund Ram, Mukhtar-i-am of the firm of Ram Karan, Ram Bilas. On the 16th of December, 1907, an application was put in and signed by a vakil on behalf of Ram Karan, Ram Bilas to the effect that he nominated certain persons to act on his behalf as a jury to decide the question raised by the Sub-Divisional Magistrate. The Magistrate accepted the persons named by or on behalf of Ram Karan, Ram Bilas, and nominated two other persons to serve on the jury. On the 3rd of January, 1908, the jury submitted a verdict, which was duly placed upon the record, and an order passed that the *pacca chabutra* and tin shed should be removed. No objection at the time was raised to this verdict, as the order of the Magistrate on the same will show. But in revision here it is urged that section 133 of the Code of Criminal Procedure cannot apply to these proceedings. It is further contended that the proceedings have not been regularly held and that the conclusion was not based on the evidence, but on a local inspection.

Among other grounds urged before me was that the notice under section 133 had never been legally served upon Ram Bilas. Neither of the affidavits go so far as to say that he (Ram Bilas) has not been cognizant of the proceedings. Stress is laid on the technical point that the summons was served, not upon him but upon his agent. I find it impossible to believe that in a matter like this Ram Bilas could or would have been kept in ignorance of what was going on, and this adds more significance to the fact that the affidavit nowhere expresses his personal ignorance of what was taking place. Again, the learned Counsel who appeared for Ram Bilas took his stand upon several rulings of the Calcutta High Court, notably that of *Kailash Chunder Sen v. Ram Lal Mittra* (1). The Calcutta High Court appear to hold that when a person called upon, under section 133, to show cause why an obstruction should not be removed from a public way, denies that the latter is a public way, it is for the Magistrate to determine whether this is a *bona fide* objection, and he cannot, in spite of the objection, unless he determines that it is not *bona fide*, refer the matter to the jury. The jury is not competent to decide

(1) [1899] I. L. R., 26 Cal., 869.

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Knox, J.

whether the way obstructed is or is not a public way. How far this goes or does not go beyond the Code, I need not decide. The question which was at issue was that the *chabutra* and shed complained of were unlawful obstruction which should be removed from a way which was lawfully used by the public. The contention raised on behalf of Ram Bilas is that the *chabutra* and shed are not situate in that portion which is admittedly portion of a way lawfully used by the public, but fall within a certain portion of that ground which had been by some Magistrate remitted for use by the persons who have erected shops in this public place. I think the question raised was one which could, under the terms of the Code, be left to a jury to decide.

Again it was contended on the strength of the Calcutta case <sup>(1)</sup> that a jury was bound to hear the parties and such witnesses as they desired to have heard. This Court, however, in *Queen-Empress v. Khushali Ram* <sup>(2)</sup> laid down no hard and fast rule upon this point. The learned Chief Justice, who decided that case, held that if a jury required evidence, evidence should be produced before it, and that in that case it was for the Magistrate to show by evidence that the obstruction referred to was an obstruction of a public way or in a public place. So far as I can see, Chapter X does not lay down any rule as to the procedure that must be adopted by a jury. The questions which are now raised are questions which, it appears to me, should have been raised by or on behalf of the firm long ago in the case.

It has been held by a learned Judge of this Court in—*In the matter of the petition of Lachman* <sup>(3)</sup> that a person who applies for a jury is bound by the verdict of the jury and cannot raise such a plea as that the obstruction was caused in the exercise of a *bona fide* claim of right. So far as I can judge from the record, the firm of Ram Karan, Ram Bilas had long and sufficient notice of the action which the Divisional Magistrate intended to take, and I am not prepared in revision to interfere. I dismiss the application.

*Application dismissed.*

(1) [1899] I. L. R., 26 Cal., 869.

(2) [1895] I. L. R., 18 All., 158.

(3) A. W. N., 1900, page 180.

PHUL CHAND AND ANOTHER  
*versus*  
 CHAND MAL.\*

CIVIL.

1908.

April 2.

STANLEY, C.J.,  
BURKILT, J.

*Civil Procedure Code (Act XIV of 1882), section 266—Mortgagees not advancing the whole amount—Balance whether a debt—Attachment—Suit by purchaser—Cause of action.*

The unpaid portion of a loan does not constitute a debt due by a mortgagee to a mortgagor and could not be attached as such in execution of a simple money decree against the mortgagor. The purchaser of such a debt has no cause of action to bring a suit against the mortgagees. *The South African Territories Limited v. Wallington*, 1898, A. C., 309, referred to.

APPEAL against the decree of Babu Pramatha Nath Banerji, Subordinate Judge of Jhansi.

Suit to recover a sum of money.

The facts were as follows :—

On 18th April, 1903, Sheoram and others executed two usufructuary mortgage deeds for Rs. 6,000 and 1,000 respectively in favour of Phul Chand and Gulab Chand. It was alleged that out of the Rs. 7,000, the mortgagees paid only Rs. 2135-11-0 to the mortgagors and the balance Rs. 4,864-5-0 still remained in their hands. One Janki Prasad, an execution creditor of the mortgagors attached this sum of Rs. 4,864-5-0 in the hands of the mortgagees, which was sold by auction, and purchased by the plaintiff, Rai Seth Chand Mal on 25th November, 1903, and he sued to recover the unpaid mortgage-debt with interest from the defendants mortgagors.

The defence was that the entire consideration of the two mortgage-deeds had been paid off, and therefore the plaintiff was not entitled to recover anything.

The Subordinate Judge of Jhansi held that all but Rs. 1,800 had been paid by the mortgagees, and he gave a decree in favour of the plaintiff for that sum, and dismissed the rest of the claim.

Defendants appealed.

\* F. A. 198 of 1906.

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1908.

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CHAND MAL.

*J. N. Chaudri*, for the appellant, contended that a suit by a borrower or his representative to recover the loan or any part thereof promised to be advanced by a creditor is not maintainable, and there can be no transfer of the right of a borrower (if any such right can exist) to receive the promised loan. And in the present case, the plaintiff having purchased at auction the right of the borrower to recover the unpaid part of a promised loan, has not acquired any such right as he can enforce by suit against the creditor.

*Sundar Lal* (with him *Durga Charan Banerjee*), contended that the mortgage being usufructuary, and the mortgagees having got possession were bound to fulfill their part of the contract, and the unpaid part of the consideration in the hands of the mortgagee in possession was money belonging to the borrower which he or his representative could seek to recover by suit. It was not a suit to compel a creditor to lend, but a suit to recover money belonging to the mortgagor in the hands of the mortgagee. Such money was not property not capable of transfer. Plaintiff was not the purchaser of a mere right to sue, the transfer of which is prohibited by section 6 of the Transfer of Property Act.

*J. N. Chaudri*, in reply, cited

*The South African Territories Limited v. Wallington*, [1898] A. C., 309.  
*Anakaram Kasmi v. Shaidamadath Avulla* [1878] I. L. R., 2 Mad., 79.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The question involved in this appeal is one out of the ordinary course. On the 18th of April, 1903, one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that Rs. 2,135-11 were paid by the mortgagees, and that the remainder is unpaid. Some creditors of the mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money, and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November, 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them, and a decree for

portion of the amount claimed was passed in favour of the plaintiff. The present appeal was then preferred, and the main ground of appeal is that there was no debt due by the mortgagees to the mortgagors which could be attached within the meaning of section 266 of the Code of Civil Procedure ; that the promises of the mortgagees to lend the amounts mentioned in the mortgage-deeds did not constitute debts which could be attached, and that the only remedy, if any, of the mortgagors against their mortgagees was a suit for damages for breach of contract, if any damages could be proved.

The question is not free from difficulty, but it appears to us that a decision of the House of Lords, which was brought to our notice by the learned advocate for the respondents, must be taken by us to be conclusive on the point. This is the case of *The South African Territories Company Limited v. Wallington* <sup>(1)</sup>. The facts of that case were shortly as follows : The plaintiff Company issued sixteen debentures to the defendant Wallington on his undertaking to pay the face-value of the debentures by instalments. Wallington paid some of the early instalments, but failed to pay the balance, and thereupon a suit was instituted against him for specific performance, of his agreement or for damages. WRIGHT, J., before whom the trial took place, held that the claim for specific performance could not be sustained, but gave judgment for the plaintiff Company for damages on the ground that a debt had been created by the defendant's promise to pay, contained in his letter of application for the debentures. Judgment was entered for the plaintiffs for £520, the amount of the instalments due and unpaid up to date of the writ and costs. An appeal was preferred, which was heard by Lord Esher, M. R., and Lopes and Chitty, L. JJ., who reversed the decision of the court below and entered up judgment for the defendant. An appeal was preferred to the House of Lords, with the result that the decision of the Court of Appeal was upheld. Their Lordships held that on the default of Wallington to make the payments which he had undertaken to pay, the moneys remaining due by him for unpaid instalments did not constitute a debt to the Company ; that the Company was only entitled to damages for actual loss caused by the breach of contract. Lord

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(1) [1898] A. C., 300

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*Stanley, C. J.*

Halsbury, L. C., in his judgment with respect to the claim for specific performance remarked that "a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge below, to grant a decree for specific performance was perfectly right. But of course in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition, he is entitled to such damages as are appropriate to the nature of the contract." Lord Watson in the course of his judgment observed that "the only engagement made by the respondent with the Company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance," and later on he says :—"The only remedy open to the company was by action against the respondent for any loss or damage which they might sustain through his breach of promise." The other Lords endorsed this view, namely, that no suit will lie to compel a party to fulfil an agreement to advance money. This decision is in entire accord with the view which we expressed at an early stage of the hearing and carrying the weight which it necessarily does, must conclude this appeal. The mortgagees were never in a position to enforce specific performance of the agreement of the mortgagees to advance the full sum agreed to be lent by them. The unpaid portion of the loan did not constitute a debt due by them to the mortgagors such as could be attached under the Code of Civil Procedure. It may be that the mortgagors have some ground of complaint against the mortgagees, and they may be in a position to obtain damages for the breach by the mortgagees of their contract, but this matter is not before us, and we express no opinion upon it. We merely hold that the plaintiff has no cause of action against the mortgagees. We allow the appeal, set aside the decree of the court below, and dismiss the plaintiff's suit with costs in both courts.

S. C. C.

*Appeal dismissed.*

BACHAN SINGH

*versus*

KARAN SINGH.\*

CIVIL.

1908.

June, 12.

BANERJI, J.  
RICHARDS, J.*Agra Tenancy Act (II of 1901), section 201—shall presume—meaning of—Presumption conclusive.*

The object of section 201 of the Agra Tenancy Act is that when the name of the plaintiff is recorded in the revenue papers, the court is bound to presume that he has the right to sue, and the entry of his name should be regarded as sufficient proof, and the court should not go behind it in order to determine the question of the plaintiff's proprietary title, the remedy of the defendant being a civil suit. The words "shall presume" in section 201 of the Agra Tenancy Act do not have the same meaning which are given to them under the Evidence Act but the presumption raised by them is a conclusive presumption so far as the Revenue Courts are concerned.

SECOND APPEAL against the decree of H. W. Lyle Esq., District Judge of Farrukhabad, confirming a decree of Munshi Avadh Behari Lal, Assistant Collector, first class.

Suit for profits.

The facts are as follows :—

The plaintiff Karan Singh was the mortgagee of a certain share in a village and his name was recorded in the village papers as such mortgagee. The defendant Bachan Singh was the lambardar of the village. The plaintiff sued the defendant to recover his share of the profits for 1309, 1310 and 1311 *Fasli*. The defence, *inter alia*, was that the plaintiff was not, and had not been for more than 12 years before suit in possession of the share in dispute, and that the defendant was in adverse proprietary possession. The court of first instance decreed the claim. The District Judge dismissed the appeal. His judgment ran as follows :—

I think this appeal must fail on a preliminary point. The plaintiff sues for profits. The patwari alleges and it is not denied that the plaintiff is entered in the khewat as mortgagee of  $2\frac{1}{2}$  biswas, but his right to sue for profits is contended that the defendant is in adverse possession that the plaintiff's mortgagee rights have been merged in full proprietary rights etc., etc.

\* S. A. No. 1100 of 1905.



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1908.

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In my opinion, these are not questions for a Revenue Court to decide in a suit for profits.

Section 201 (3) of the Tenancy Act runs as follows :—“ If the plaintiff is recorded as having such proprietary right, the court shall presume that he has it. But nothing in this sub-section shall affect the right of any person to establish by right in the civil court that the plaintiff has not such proprietary right.” In appeal it has been strongly contended that the words “ shall presume ” in the Tenancy Act bear the same meaning as they do in section 4 of the Evidence Act. I do not agree with this view. In my opinion what is meant by Section 201 (3) is that the entry of the plaintiff's name in the Revenue papers is conclusive proof of his ownership so far as Revenue Courts deciding profits cases are concerned but that this will not prevent the unsuccessful party bringing a suit in the Civil Court to contest the plaintiff's title. If the words “ shall presume ” bear the same meaning as they do in the Evidence Act, these words could simply mean that the Court is to follow the entry in the Revenue papers until that entry is proved to be wrong. If this were so, I can not see the object of providing that the defendant may sue in the Civil Court to establish the plaintiff's want of title. If this were the correct interpretation suits for profits would be exactly the same as other suits under the Act. If questions of title arise they would be dealt with under section 199 as is provided by the first part of section 201. Reading the whole section together, I am decidedly of opinion that the meaning of the section is that where the plaintiff's name is recorded in the village papers, the Revenue Court when deciding a case for profits is bound to accept that entry, and that the defendant's remedy is by separate suit in the Civil Court. The Tenancy and Revenue Acts were passed about the same time and the meaning of the expressions used in both Acts are presumably the same. In the latter Act, section 44 lays down that all entries in the annual register *shall be presumed* to be correct until the contrary is proved. Again section 57 provides that all entries in the Record of rights *shall be presumed* to be correct until the contrary is proved. Now if the words “ shall be presumed ” bear the same meaning as they do in the section 4 of the Evidence Act, the addition of the words “ until the contrary is proved ” is wholly superfluous. In my opinion, the fact that plaintiff is entered in the village papers is sufficient to give him a right to sue for profits. If the defendant wishes to deny his title on the ground of adverse possession or on any other ground he must go to the Civil Court.

I therefore dismiss the appeal. The appellant will pay the respondent's costs.

Defendant appealed.

*Surendra Nath Sen*, for the appellant, submitted that the expression ‘ shall presume ’ had not been introduced for the first time in the Indian Statute Book in 1901 ; that it had obtained currency ever since the Evidence Act of 1872 and that

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the legal meaning assigned to it in the Evidence Act had been uniformly and consistently accepted. Apart from the definition given in the said Act, following the natural and grammatical meaning of the phrase, it could not be made to signify anything higher than a rebuttable presumption. The framers of the Act were fully cognisant of the distinction between a *prima facie* presumption as expressed by 'shall presume' and an irrebuttable presumption; and where they meant a presumption of the latter description, they had used suitable expression as in section 8 of the Tenancy Act. It is true that in some of the sections of the Tenancy Act and the Land Revenue Act, the words 'shall presume' were coupled with the words 'until the contrary is proved.' But from this to conclude that 'shall presume' unqualified by the other words, must necessarily be regarded as equivalent to conclusive proof was stretching the argument too far;—more specially in view of the fact, that the two Acts aforesaid were not the very models of draftsmanship. If in every case in which plaintiff's name happened to be recorded in the *khewat*, without any regard to the fact that the plaintiff had no subsisting title, the court decreed the suit for profits, serious anomalies would arise and in many cases miscarriage of justice would ensue. If the plaintiff without any title obtained a decree from the Revenue Court, the defendant's remedy was merely prospective. He might get his right established by the Civil Court; but the Civil Court was not competent to avoid the decree for profits, which the plaintiff without any right obtained from the Court of Revenue. The declaration of his right by the Civil Court would not prevent the execution of the decree for profits. The result was that in this view of the law, the plaintiff was invested with the power to exact sums of money from the defendant without any right and the defendant had no remedy. This interpretation would also lead to the inference, that in a suit for profits, the courts of law were not expected to exercise their minds judicially in the trial of the suit but that they were bound almost mechanically to follow the entry in the revenue record in the teeth of opposing facts. Then again cases were conceivable in which the court might discard the entry in the Revenue papers. As for instance when the plaintiff suing for profits was not a recorded co-sharer, the name of a widow

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having been recorded in the papers and who did not oppose the suit, but that the suit was resisted by another defendant on the ground that the plaintiff had no title to the property, the person entitled being the widow. Here there was no bar to the Revenue Court trying the question of title and ignoring the entry in the revenue records. It might be further pointed out that if the appellant's contention was accepted, it would not necessarily lead to multiplicity of suits, the right of suit having been given to the unsuccessful defendant and not to plaintiffs and defendants promiscuously. It could not be said that the plaintiff was prejudiced by this distinction in favour of the defendant, for he reaped the full benefit of the entry in the revenue papers by the *onus* being cast on the defendant.

He relied on

*Dil Kunwar v. Udai Ram* [1906] I. L. R., 29 All., 148.

*Dhanka v. Umrao Singh* [1907] A. W. N. 43.

*Dkanka v. Umrao Singh* [1906] I. L. R., 29 All., 158.

*Banwari Lal v. Niadur* [1906] I. L. R., 30 All., 58.

and commented on the unreported cases

F. A. F. O., 70 of 1904 decided on 22-5-05.

S. A., 152 of 1907 decided on 21-5-08.

and the *dissentient* judgment of the Hon'ble Mr. JUSTICE RICHARDS, in *Dhanka v. Umrao Singh*.

*Gulzari Lal*, for the respondent, was not called upon to reply.

The following judgments were delivered.

*Banerji, J.*

BANERJI, J.—This appeal arises in a suit for profits brought against the lambardar by the mortgagee of a recorded co-sharer. The name of the plaintiff is also recorded in the revenue papers. The claim was resisted on the ground that the plaintiff had no proprietary right and that the defendant was in adverse proprietary possession. The court of first instance decreed the claim in part and this decree has been affirmed by the lower appellate court. The learned Judge was of opinion that having regard to section 201, sub-section (3), of the Agra Tenancy Act, the Court could not go behind the entry in the revenue record, and was not competent to try the question of proprietary right raised on behalf of the defendant. The correctness of this decision is impugned in this appeal. Section 201 of the Agra Tenancy Act provides for suits for profits brought by two descriptions of plaintiffs :

(1) those whose names are not recorded as having the proprietary right entitling them to bring the suit, and (2) those whose names are so recorded. As regards the first class of persons, the section provides that the court shall proceed in the manner directed in section 199, that is to say, it may either require the plaintiff to institute a suit in the Civil Court to establish his right, or it may determine the question of title itself, constituting itself for that purpose a Civil Court, the defeated party having a right of appeal to the District Judge or the High Court as the case may be. In the case of a plaintiff whose name is recorded, the section provides that the court shall presume that he has such right. But it further provides that in such a case a suit may be brought in the Civil Court to establish that the plaintiff has not such proprietary right. It is thus clear from the proviso that if the plaintiff is a person whose name is recorded in the revenue papers, it is for the defendant to bring a suit in the Civil Court to have it established that the plaintiff has no such right. It seems to me that the object of the section is that when the name of the plaintiff is recorded in the revenue papers, the court is bound to presume that he has the right to sue, and the entry of his name should be regarded as sufficient proof and the court should not go behind it in order to determine the question of the plaintiff's proprietary title, the remedy of the defendant being a civil suit. If the defendant can disprove the plaintiff's title in the Revenue Court and that court can try the question of title, the proviso is superfluous. Under sections 44 and 57 of the Land Revenue Act (No. III of 1901), an entry in the revenue registers and in the record of rights is *prima facie* evidence of what it records, and any one disputing it has the right to sue in the civil court to establish his right. Those sections would give to the defendant all the remedy that he might be entitled to, and therefore the whole of clause (3), including the proviso, would be unnecessary and superfluous. Any other view would lead to anomalies. If the plaintiff's name is not recorded, the Revenue Court has the option of not trying the question of title, and may refer the plaintiff to the Civil Court. But according to the contention of the appellant, if the name of the plaintiff is recorded, the Revenue Court has no option, but must try the question of title. Again, if the decision of

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that question by the Revenue Court is adverse to the plaintiff, he has under the proviso, no right of suit in the Civil Court. So that the defendant has two remedies open to him whilst the plaintiff has only one. Surely that could not have been the intention of Legislature. It is contended that the words 'shall presume' in section 201, sub-section (3), must be read as having the same meaning which is given to those words in the Evidence Act. In my judgment that was not the intention of the Legislature, because we find that in the Tenancy Act and in the cognate Act No. III of 1901 where the Legislature intends any entry to be *prima facie* evidence of what it records, it uses the words "until the contrary is proved." I may refer to section 108, sub-section (2) of the Tenancy Act, and sections 44, 57 and 48 of the Land Revenue Act. It is true that in section 9 of the Tenancy Act, it is provided that certain entries shall be conclusive proof of a person being a permanent tenure holder or a fixed rate tenant or not as the case may be, but it must be borne in mind that the two Acts were not drawn up with as much care and precision as they should have been. Furthermore, it seems to me that in section 201, sub-section (3), it could not be declared that the record of the plaintiff's name should for all purposes be conclusive proof of the plaintiff's title, because the proviso to that very section enables the defendant to bring a suit in the Civil Court to have the question of title tried, and the correctness of the entry tested. Therefore when in sub-section (3) the Legislature provided that if the plaintiff is recorded as having the right, the Court should presume that he has it and should leave it to the defendant to have the question of title tried in a Civil Court, the object of the Legislature was clearly to declare that for the purposes of the suit in the Revenue Court, the entry should be regarded as sufficient proof, and the court should not go behind it. That such was the intention would be abundantly manifest if it were permissible to us to refer to the report of the Select Committee on the Bill which afterwards became Act No. II of 1901. Apart, however, from this, the whole context of the section and the policy of the Act lead, in my opinion, to only one conclusion, namely, that the Revenue Court should not go behind the entry. In the case of the person whose name is not recorded, the Act provides that the question of his

title should be tried by only one court, namely, either by the Civil Court or the Revenue Court, which may constitute itself a Civil Court. I fail to see why in the case of a plaintiff, whose name is recorded two remedies should have been given to his opponent, namely, a remedy of trial by the Revenue Court and a suit in the Civil Court. In the suit in the Civil Court, the decision in the Revenue Court will be nugatory and of no value. Such certainly could not have been the intention of the Legislature. The view I have expressed above was held by my brother Richards and myself in the case of *Nias Ali Khan v. Govind Ram* <sup>(1)</sup> decided on the 22nd of May, 1905. The same view was taken by my brother Richards in his dissentient judgment in the case of *Dhanka v. Umrao Singh* <sup>(2)</sup> and recently by Mr. Justice Karamat Husain in *Har Prasad v. Muhammad Baqar* <sup>(3)</sup>. The opposite view was held by Mr. Justice Knox in *Dil Kunwar v. Udat Ram* <sup>(4)</sup>, and also in his judgment in *Dhanka v. Umrao Singh*. In the same case it was held in appeal under the Letters Patent <sup>(5)</sup> that the presumption enjoined by section 201 is not conclusive, but may be rebutted by evidence offered to the contrary. With great respect, I am unable to agree with the decisions in the cases in which the contrary has been held. It appears to me that in those cases the considerations to which I have referred above were not given due weight. In the case last mentioned, there is no reference to the proviso to section 201 on which the decision of the question entirely depends. We have been referred to the case of *Banwari Lal v. Niadar* <sup>(6)</sup> to which I was a party. In that case the District Judge had held that it was for the plaintiffs to show that they and their predecessors-in-title had within 12 years collected the profits. From this view we dissented, and we pointed out the provisions of section 201. No doubt in the judgment the following words occur:—"it was for the defendant to rebut the presumption the law raised in the plaintiff's favour." As regards this, I may observe that the question whether the presumption under section 201 was

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(2) [1907] A. W. N. 43.

(3) S. A. 152 of 1907 decided on the 21st of April, 1908.

(4) [1906] I. L. R., 29 All., 148.

(5) [1906] I. L. R., 30 All., 58.

(6) [1906] I. L. R., 29 All., 158.

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a rebuttable presumption or not, was not discussed and this observation was only an *obiter dictum*. However, on full consideration I think it was erroneous. In my judgment the conclusion at which the court below arrived is right. I would accordingly dismiss the appeal with costs.

RICHARDS, J.—The learned District Judge dismissed the appeal in the court below on the ground that on the true construction of section 201, sub-section (3), of the Agra Tenancy Act, the plaintiff being recorded as having proprietary title was entitled to a decree. I entirely agree with the decision and reasons given by the learned District Judge. A difficulty, however, arises by reason of the fact that a contrary view was taken by a Bench of this Court in the case of *Dhanka v. Umrao Singh* (7). My learned colleague has referred to the various cases in which the construction of section 201 of the Act has been considered, and it seems to me that we are entitled, having regard to the conflict of authority, to consider the provisions of the section without feeling bound by any previous decisions. The case of *Dhanka v. Umrao Singh* was heard in the first instance by Knox, J. and myself. In the course of my judgment, I give at some length my reasons for holding that under the provisions of sub-section (3) of section 201, a Revenue Court could not go behind the entry in the khewat recording the plaintiff's proprietary title. The judgment is reported in the Weekly Notes, 1907, p. 43. I endeavoured to point out that if the Legislature intended that the entry should merely raise a *prima facie* case in favour of the plaintiff, the whole sub-section was quite meaningless and superfluous. Sections 44 and 57 of the Revenue Act had already made entries of this nature *prima facie* evidence, and it was therefore entirely unnecessary to re-enact in section 201 of the Tenancy Act what was already abundantly provided for by a general section of the Revenue Act. I also pointed out how inconvenient such a construction would be having regard to the proviso to sub-section (3). I would, however, here like to correct an error in my judgment in the case. At p. 44 of the Report, the following passage occurs:—  
“To hold otherwise necessarily involves the almost absurd result that the Revenue Court can decide the question of title

(7) [1906] I. L. R., 30 All., 58.

against the plaintiff, and that notwithstanding such decision the same plaintiff can at once go to the Civil Court to try the same question over again." The word 'defendant' should be substituted for the word 'plaintiff' because it is quite clear that it is only the defendant who is entitled to go to the Civil Court and ask for a declaration that the plaintiff has no title. It seems to me that the very fact that it is the defendant and not the plaintiff who is entitled under the proviso to go to the Civil Court is the strongest possible argument in favour of the construction given to the section by the learned District Judge. As pointed out by my learned colleague in the course of the judgment, he has just delivered, if the construction contended for by the appellant is to be given to the sub-section, the defendant is entitled to a complete trial of the question of title in the Revenue Court, and if the decision be against him he can have the same question retried in the Civil Court. Why is a plaintiff whose title is recorded not given the same right of going to the Civil Court? The answer is, I think, because, his title being recorded, the Revenue Court cannot decide the question of title against him, and he has therefore no necessity to go to the Civil Court. I have not at all lost sight of the fact that the view that I take did not find favour with the Bench before whom the case of *Dhanka v. Umrao Singh* came in a Letters Patent Appeal. I have therefore reconsidered my judgment, and I have also very carefully considered the judgment of the Court hearing the appeal. It seems to me that the proviso to sub-section (3) altogether escaped the notice of the Court. None of the reasons I gave for arriving at the conclusion at which I did arrive are dealt with in the judgment of the Court. The learned Judges ask:—"Is there any grave reason for interpreting the words 'shall presume' as equivalent to the words 'shall conclusively presume.' I think that there are grave reasons for holding that a Revenue Court, in suits instituted under the provisions of Chapter XI of the Act, should not go behind the record of the proprietary title of the plaintiff. The clear intention of the section itself is one reason which would be defeated by any other construction. The section provides the course the Court is to adopt—(1) in the case of a plaintiff who is not recorded, and (2) in the case of a plaintiff who is

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recorded. Sub-section (3) is without object or meaning if the Revenue Court is to go behind the entry, and renders two conflicting decisions possible. The learned Judges say:— "The question is by no means free from difficulty" and towards the end of the judgment "*on the whole*, we see no reason for giving conclusiveness to a presumption where the Legislature has not in express terms done so." It seems to me that the learned Judges formed no very strong opinion contrary to the opinion that we took in the case of *Niaz Ali Khan v. Sahu Gobind Ram*, and which we still hold after further consideration. The decision seems to me to be based upon the definition of the words 'shall presume' in the Evidence Act. There is no similar definition in the Agra Tenancy Act. The whole object of section 201 of the latter Act and the proviso to sub-section (3) clearly show, I think, that the meaning given by express definition in the Evidence Act to the expression 'shall presume' cannot be given to the same words in section 201, sub-section (3) of the Tenancy Act. A perusal of the provisions of the Revenue Act clearly shows that it was the intention of the Legislature to make the records in the revenue registers and record of rights as accurate and as valuable as possible. Elaborate provisions are made for their preparation and correction, and it certainly is not unnatural to suppose that the Legislature intended by sub-section, (3) that in a Revenue Court these records should be deemed conclusive in certain specified suits, namely, in suits instituted under the provisions of Chapter XI of the Act. The value and efficacy of these records will be much enhanced if pressure is brought to bear on persons entitled to proprietary rights to have such rights recorded. In section 108, sub-section (2), a receipt is made *prima facie* evidence of an acquittance in full up to the date of the receipt. The words used are "it shall be presumed until the contrary is shown." Here we have an instance in which the same words in the same Act are qualified by the words "until the contrary is shown." Section 44 of the Land Revenue Act (passed the same day as the Tenancy Act) provides that the entries in the Annual Registers "shall be presumed to be true until the contrary is proved." Section 57 provides that all entries in Records of Rights "shall be presumed to be true

until the contrary is shown." It cannot be said that where the Legislature intended the words 'shall presume' to create merely a *prima facie* presumption it never said so. It is true that the expression 'conclusive proof' occurs in section 9. This section, however, refers to all courts and not merely to a Revenue Court.

The point involved is one of great importance and of frequent occurrence. After full consideration, I have no doubt but that the decision of the court below was correct, and I also would dismiss the appeal with costs.

BY THE COURT—The appeal is dismissed with costs.

S. N. S.

*Appeal dismissed.*

## KHEORAJ AND OTHERS

*versus.*

## KING EMPROR.\*

*Criminal Procedure Code (Act V of 1898), sections 271 (2), 342—Accused pleading guilty—Procedure postponing conviction to allow confession to be considered against co-accused—General examination of the accused.*

When an accused person pleads guilty, the court should record the confession and forthwith convict him thereon. If there are other persons being tried with him for the same offence, the court should not postpone his conviction merely for the purpose of allowing the statements he may have made to be considered against the co-accused. It is against the spirit of law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence. *Queen Empress v. Paltua*, 1. L. R., 23 All., 53, referred to.

The general examination of the accused provided for by section 342 can be made only for the purpose of enabling the accused to explain the circumstances appearing against him in evidence. The court should not ask a confessing accused "who were with you in the dacoity."

CRIMINAL APPEAL against an order of Lala Baij Nath, Additional Sessions Judge of Moradabad.

The appellants were not represented.

\* Cr. Ap. 527 of 1908.

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*W. K. Porter*, Assistant Government Advocate, for the Crown.

The judgment of the Court was delivered by

RICHARDS, J.—The three appellants Kheoraj, Ilahi Baksh and Thannu or Thanwa have all been convicted under section 399 I. P. C., and sentenced to transportation for life. On the 29th of January last a large band of dacoits attacked the house of one Dinanath Bania of Mauza Badhaiti Fazalpur. The dacoity was a most lawless and audacious one. The dacoits were armed with lathis, pistols, revolvers, daggers and knives. However the villagers were prepared for the dacoits and attacked them with considerable courage. One of the dacoits was killed by his own friends by mistake. The villagers managed to secure the corps which no doubt largely assisted in bringing the criminals to justice. One of the villagers was badly wounded and afterwards died. Sixteen persons were put on their trial for a charge of having taken part in the dacoity. Fourteen were convicted and all sentenced to transportation for life. Two only of the persons charged were acquitted. Of these persons who were convicted Kheoraj, Ilahi Baksh and Thanwa alone have appealed. The only question before us is whether or not it has been sufficiently proved that each of the appellants took part in the dacoity. A man named Girdhari Singh turned approver. He was pardoned and examined as a witness. Chidda one of the persons who was convicted was evidently anxious to become an approver. He made a complete confession of his own guilt, which strange to say, he adhered to even in the Sessions Court. In the Sessions Court he pleaded guilty. It was pointed out to him that the confession would not save him from punishment. He nevertheless said that he was in the dacoity. Towards the end of the judgment the learned Judge says that "the court convicts Chidda on his own plea of guilty." We think it necessary at this stage to point out to the learned Judge an error in his conduct of the trial of the case. Notwithstanding Chidda's plea of guilty he kept him in the dock with the rest of the accused. He "considered" the confession of Chidda in considering the question of the guilt or innocence of the other accused. Furthermore at the conclusion of the evidence for the prosecution he put the

following question to Chidda " who were with you in the dacoity." Section 271 (cl. 2) of the Code of Criminal Procedure provides that if the accused pleads guilty the plea shall be recorded and he *may* be convicted thereon. It often happens that when an accused person is called upon to plead he makes a statement which may or may not amount to a plea of guilty and it is frequently very proper that the court should enter a plea of not guilty and proceed with the evidence. However if there are a number of other persons being tried at the same time for the same offence the court certainly ought not to postpone the conviction of the accused merely for the purpose of allowing the statements he may have made to be considered against the co-accused. We think that if the court was prepared to have convicted Chidda on his plea of guilty (supposing he had been tried by himself) it ought to have at once convicted him. Section 30 of the Evidence Act provides that a confession made by one person can be considered against other persons who are being tried jointly for the same offence. In our judgment where an accused person has pleaded guilty and the court is prepared to convict on that plea it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence. See the case of the *Queen Empress v. Paltuwa* (1). Section 342 Criminal Procedure Code gives power to the Court at any stage of the trial to put questions, to the accused for the purpose of enabling such accused to explain any circumstance appearing in the evidence against him. The section further directs at the close of the case for the prosecution to question the accused generally on the case. But the general examination is only to be for the purpose of enabling the accused to explain in the circumstances appearing against him in the evidence. The question put to Chidda namely " who were with you in the dacoity " was a highly improper question even if Chidda had never pleaded guilty. We now proceed to deal with the case of each of the appellants, discarding the confession and other statements of Chidda. Thunwa is mentioned by Girdhari the approver, only one other witness identifies him, *viz.* Suraj Mal. Suraj Mal made a mistake and identified a man as having

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taken part in the dacoity who could not have been there. This mistake was a mistake made by several of the other witnesses and is perhaps explained by the fact that the man whom he purported to identify bore a striking resemblance to one of the dacoits. Thanwa from the commencement has stated that he was ill at the time the dacoity was committed. He examines several witnesses to support his allegation. He does not say that Girdhari himself bore him any enmity, but he says that a friend of Girdhari's namely Roshan Singh instigated Girdhari to name him. We think there is some doubt as to the guilt of Thanwa. Kheoraj is identified by the approver Girdhari. The learned Judge says that he was identified by Dinanath and Jiwa Ram in jail and in the lower Court by Dallu. No one identifies him except Girdhari in the Sessions Court. His case is that Girdhari bore him ill will. He says also that he had taken two accused persons from Ganwan to the police station at Rajpura on the day the offence was committed. One witness whom he calls proves that he did bring the prisoners to Rajpura on the 29th of January and that he left the same immediately as he had "urgent business." It appears that the scene of dacoity is ten *kos* from Rajpura. He also examined a witness named Nizam. We think that the evidence in the sessions court is insufficient or at least that a reasonable doubt exists in the case of Kheoraj also. Illahi Bakhsh is identified by a number of witnesses in addition to the informer Girdhari. Dinanath, Dallu Chhutan, Fajji and Jiwaram, son of Kewal all identified him. We think that the case was fully proved against Illahi Baksh. We allow the appeals of Thanwa and Kheoraj and setting aside the convictions and sentences in their case we acquit them of the charge on which they were tried and direct that they be released. We dismiss the appeal of Illahi Bakhsh and we direct that a copy of our judgment be sent to the learned Additional Judge of Moradabad.

*Order modified.*

## MUSHARRAF ALI

*versus*

## SHAUKAT ALI AND OTHERS.\*

*Mahomedan Law—Pre-emption—Shafi khaleet—Partner in the immunities or appendages—Nature of right—Common servient tenement between property of vendee and property in dispute.*

Plaintiff pre-emptor and defendant No. 2, vendor, were brothers. Defendant, vendor sold to defendant No. 1 a neighbour, two houses adjacent to each other, and between the female apartments of which and the house of the plaintiff, there was a passage for the use of the inmates. Plaintiff sued for pre-emption as neighbour and *shafi khaleet*. The defence was that the plaintiff had no right of pre-emption in preference to that of the vendee who was a neighbour and also a *shafi khaleet*, inasmuch as the water from the privy of his house passed through the land of a third person over which land the water from the roof and *Parnalus* of the houses in dispute also fell.

*Held*, that under the Mahomedan law, the right of the defendant vendee over the land of the third person was a totally different right from that of the defendant vendor over the same land. The defendant vendee was not a participator in any sense either in the property sold or in any of its immunities or appendages.

SECOND APPEAL against the decree of C. D. Steel Esq., District Judge of Shahjahanpur, confirming a decree of Pandit Kunwar Bahadur, Officiating Subordinate Judge.

This was a suit for the possession of two houses by right of pre-emption under the Mahomedan Law. The circumstances were as follows. Sarfaraz Ali defendant No. 2, brother of Shaukat Ali, the plaintiff pre-emptor sold two houses adjacent to each other to Musharraf Ali, defendant No. 1, who was a neighbour, under a sale deed, dated the 16th April, 1905. The plaintiff claimed the said houses by right of pre-emption under the Mahomedan Law as a neighbour and a *shafi khaleet* alleging that his house adjoined both the houses sold, and that there was a passage connecting the plaintiffs house with the female apartments of the houses sold for the use of the inmates. He claimed to have made the necessary demands duly. Musharraf Ali raised the defence that he was also a neighbour and *shafi khaleet* and that the plaintiff had no preferential right of pre-emption as against him. It appeared that the land of one Salamat Ali separated the house of Musharraf Ali from the premises sold, but that Musharraf Ali had a

\* S. A. No. 665 of 1906.

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right to discharge water from his privy over this land of Salamat Ali through a drain, the vendor Sarfaraz Ali also possessing the right of discharging water from the roof and *parnas* of the premises sold on to the same land of Salamat Ali. The Court of first instance, the Subordinate Judge of Shahjehanpur decreed the claim. The Lower Appellate Court, the District Judge of Shahjehanpur, confirmed the decree. The vendee, defendant No. 2 appealed.

*S. Karamat Husain*, for the appellant.

*Ghulam Muftaba* (with him *Sundar Lal*), for the respondents.

The judgment of the Court was delivered by

*Richards, J.*

RICHARDS, J.—This was a suit for pre-emption under the Mahomedan Law. Sheikh Shaukat Ali, plaintiff respondent here is the pre-emptor. Musharraf Ali, defendant appellant is the vendee and Sarfaraz Ali was the owner and vendor of the property in dispute. The facts of the case are practically undisputed. The plaintiff is a near neighbour and is clearly entitled under the Mahomedan Law to pre-emption, unless his claim is displaced in favour of a partner in the property sold or a partner in the immunities or appendages of the property. The appellant has a right to discharge water from his privy over the land of one Salamat Ali through a drain. The owner of the property in respect of which the claim for pre-emption arises has also a right to discharge water from the roof or *parnas* also on to the land of Salamat Ali. The right of Musharraf Ali, the appellant, over the land of Salamat Ali is a totally different right from the right of Sarfaraz Ali, the vendor. It appears to us under these circumstances that the decision of the court below was quite correct. The defendant Musharraf Ali was not a participator in any sense either in the property sold or in any of its immunities or appendages. He was not a sharer or participator in the right to discharge the water from the *parnas* and it is quite impossible in our opinion for him to contend that the mere fact that he and the vendor have totally different rights over the land of Salamat Ali, a third person, can under the Mahomedan Law give him any pre-emptive right as against the plaintiff in respect of the property, the subject-matter of the suit. We dismiss the appeal with costs, which in this court will include fees on the higher scale.

J. P.

*Appeal dismissed.*

## PARBATI

*versus*

RAM PRASAD.\*

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STANLEY, C.J.

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HUSAIN, J.

*Possession—One co-sharer—Joint property—whether adverse possession.*

Exclusive possession of a co-owner of property which originally had been joint does not *per se* amount to adverse possession as against his co-sharers. Where one of the two sisters remained in possession of the father's property for twenty-one years and the other did not "participate in possession" *held*, that that only did not make her possession adverse. *Sheikh Asud Ali v. Sheikh Akbar Ali*, 1 C. L. R., 364; *Baroda Sundari v. Annoda Sundari*, 3 C. W. N., 774, referred to.

SECOND APPEAL from the decree of Louis Stuart Esq., District Judge of Meerut, reversing the decree of H. David Esq., Subordinate Judge.

The facts of the case are that one Ram Prasad had a daughter Mt. Parbati from his first wife, and Jai Dai another wife and her daughter Gomti. On the death of Ram Prasad Jai Dai succeeded to a shop left by him. On the death of Jai Dai both the sisters became the owners of the shop; but as the plaintiff was living with her husband at Bijnor, she could not take actual and physical possession of the shop. On the death of Musammat Gomti, which occurred in 1904 (Phalgun 1960), Ram Prasad the defendant entered into possession of the shop. The plaintiff brought the present suit for recovery of possession of the shop. The suit was defended on the ground of adverse possession. The court of first instance decreed the claim. On appeal by the defendant, the District Judge dismissed the claim as being time barred.

The plaintiff appealed.

*Sundar Lal*, for the appellant.

The possession of Musammat Gomti being the possession of a joint owner, it was not adverse.

*Baroda v. Annoda*, [1898] C. W. N., 774.

*Sellam v. Chinnammal*, [1901] I. L. R., 24 Mad., 441.

\* S. A. 721 of 1907.



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v.

RAM PRASAD.

The article applicable to the case is either art. 127 or article 144.

*Mahomed Ishaq Khan*, for the respondent.

In order to succeed in her claim, the plaintiff must show that she was in possession within 12 years before the institution of the suit. It was found as a fact that she was never in possession

[STANLEY, C. J.—But the possession of her sister was the possession of the plaintiff. *Sheikh Asud Ali Khan v. Sheikh Akbar Ali Khan* (1).]

*Sundar Lal*, was not heard in reply.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—We cannot determine this appeal without having a finding upon an issue which we think ought to have been determined by the learned District Judge. The only question in the case is one of limitation. Musammat Parbati claims to be entitled to a house, of which her sister Musammat Gomti was in possession for upwards of twelve years prior to her death. This house is stated to have been the only property of their father Ram Prasad, who died about 30 years ago, leaving a widow and two daughters. On his death, his widow obtained possession and upon her death 21 years ago, Musammat Gomti took possession and lived in the house up to her death about three years ago. The plaintiff Musammat Parbati resided with her husband elsewhere. It does not appear that Ram Prasad left any property save and except the house in dispute. The learned District Judge dismissed the plaintiff's suit finding that on the death of the widow of Ram Prasad, Musammat Gomti "alone succeeded to the possession of the shop. I find on the facts that Musammat Parbati has never at any time participated in the possession of or exercised any acts of proprietorship over the shop in question." It is well settled law that exclusive possession by a co-owner of property which originally had been admittedly joint does not *per se* amount to adverse possession as against his co-sharers. This certainly is the case where the co-sharers are intimately related, as the parties here. As between brothers and sisters *inter se* the fact of

(1) [1877] 1 C. L. R., 364.

possession by one does not necessarily establish that the possession is adverse possession. If the learned Judge intended to find that the possession of Musammat Gomti in this case was adverse, we should have been bound by that finding but we do not think that he did arrive at this finding. He merely held that Musammat Gomti was in possession for upwards of 12 years and that during the 12 years her sister did not in any way interfere with such possession. We would refer to the rulings in the cases of *Sheikh Asud Ali Khan v. Sheikh Akbar Ali Khan* <sup>(1)</sup>, and *Baroaa Sundari Deby v. Annoda Sundari Deby* <sup>(2)</sup>. We therefore remand the following issue, namely :—

Whether there has been sole possession for upwards of 12 years prior to the suit by Musammat Gomti Kunwar or her husband ; and, whether such sole possession has been, either from the nature of the case, or from some acts of denial of the rights of the plaintiff, adverse to the plaintiff. The Court will take such relevant evidence as the parties may adduce. The usual 10 days will be allowed for filing objections.

[On return of finding to the effect that the possession of Musammat Gomti was adverse, the appeal was dismissed on 25 July, 1908.]

M. L. S.

*Issue remitted.*

(1) [1877] 1 C. L. R., 364.      (2) [1898] C. W. N., Vol. III, p. 774.

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1908.

May, 18.

KNOX, J.  
RICHARDS, J.

DORI LAL

versus

SARDAR SINGH.\*

*Agra Tenancy, Act (II of 1901) Local—section 95 clause (b)—Declaration that plaintiff as the adopted son of a tenant was entitled to his tenancy—Declaration of tenancy—Jurisdiction—Civil Court.*

One D applied to revenue authorities that his adoptive father, I, was joint in cultivation with him and that his name should be recorded in respect of I's occupancy holding. The Collector dismissed the application on the ground that D was not the adopted son of I. D brought this suit in Civil Court for a declaration that he "was joint in cultivation with D and that he was the adopted son of Ishri and that on account of the right of survivorship and his being joint in cultivation he was entitled to the possession of the estate of Ishri and of the occupancy holding." *Held*, that the nature of the suit was that the plaintiff wanted a declaration as to the class of tenancy to which he belonged and its cognisance by the Civil Court was barred by cl. (b) of section 95 of the Agra Tenancy Act.

SECOND APPEAL against the decree of D. R. Lyle, Esq., District Judge of Moradabad, reversing a decree of Babu Kunwar Sen, Munsif of Chandausi.

Suit for a declaration.

The facts appear from the judgment.

The court of first instance decreed the claim but the lower appellate court reversed the decree.

Plaintiff appealed.

*Nehal Chand* (for *J. N. Chaudri*), for the appellant.

*Gokul Prasad* (with him *S. C. Banerji*), for the respondent.

The judgment of the Court was delivered by

*Knox, J.*

KNOX, J.—The facts out of which this appeal arises are shortly as follows: Dori Lal the plaintiff was the nephew of one Ishri deceased. Ishri was the occupancy tenant of the defendant. After the death of Ishri, Dori made an application to the revenue authorities that he should be entered as the occupancy tenant. This application was resisted by the defendant.

\* S. A. No. 274 1907.

The Assistant Collector allowed the entry to be made. The Collector on appeal held that Dori had failed to prove that he was the adopted son of Ishri or any other circumstances which would entitle him to be considered the occupancy tenant. He entered Dori Lal as tenant at will simply upon the ground that he found that he was in possession. He apparently was acting according to the provisions of Section 40 of Act No. III of 1901, which provides that "all disputes regarding entries in the annual registers shall be decided on the basis of possession." Unfortunately the Collector went into the question of whether or not Dori Lal was the adopted son of Ishri. He gave most cogent reasons for finding that he was not the adopted son and instead of allowing the matter to rest there, he for some reason invited him to go to the Civil Court and to establish, if he could, the fact of his adoption.

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The plaintiff then instituted the present suit in the Civil Court. He asks that "it may be declared and established that the plaintiff was joint in cultivation and is the adopted son of Ishri deceased that by right of survivorship and on account of being joint in cultivation he is entitled to possession of the estate of Ishri deceased and of the occupancy holding in the village of Karauli Rustampur."

The lower appellate court dismissed the suit mainly upon the ground that such suit was not cognizable in a Civil Court. The learned Counsel on behalf of the appellant admits that the suit is only cognizable in a civil court so far as he claims to have it declared that he is the adopted son of Ishri. He has to admit at the same time that the whole object of the suit is that he may claim the occupancy holding by virtue of the finding that he is the adopted son of Ishri. Section 167 of Act No. II of 1901 provides that all suits and applications of the nature specified in the fourth schedule shall be heard and determined by the Revenue Courts, and, except in the way of appeal as hereinafter provided no court other than a revenue court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. Suits brought under section 95 are included the fourth schedule. This section pro-

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vides that "at any time during the continuance of a tenancy either the land-holder or the tenant may sue for a declaration as to any of the following matters": clause (a) the name and description of the tenant of the holding; clause (b), the class to which the tenant belongs. It is unnecessary to quote the remainder of the section.

The question now before us is whether the suit brought by Dori Lal does or does not fall within clause (b) that is to say is he or is he not seeking for a declaration as to the class of tenancy to which he belongs. In our judgment that is strictly the nature of his suit. That being so the plaintiff ought to have brought this suit in the Revenue Court and not in the Civil Court. We accordingly dismiss the appeal with costs which will include fees on the higher scale in this Court.

*Appeal dismissed.*

RANJIT SINGH.

*versus*

BALDEO SINGH AND ANOTHER.\*

CIVIL.

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*May, 25.*AIKMAN, J.  
GRIFFIN, J.

*Limitation Act—(XV of 1877) Art, 178—Date of confirmation of sale—Starting of limitation for execution.*

Section 316 of the Civil Procedure Code provides that the certificate of sale is to bear the date of the confirmation of sale and it must be deemed to have been granted on the date which it bears. Although the grant of a certificate is a necessary preliminary to an application under section 318 such an application will be barred by limitation under article 178 of the Limitation Act if not made within three years of the date which the certificate bears that is the date of the confirmation of sale. Dissenting judgment of KEMBALL, J. in *Basapa v. Marya*, I. L. R., 3 Bom., 433, followed.

SECOND APPEAL against the decree of H. W. Lyle Esq., District Judge of Agra, reversing decree of Babu Chhajju Mal, Subordinate Judge.

Application for delivery of possession.

The material facts appear from the judgment.

\* E. S. A., No. 985 of 1907.

*Govind Prasad*, for the appellant.

*Sundar Lal*, (for him *Sarat Chandra Chaudhri*) for the respondents.

The judgment of the Court was delivered by

AIKMAN, J.—The appellant on the 20th of November, 1897, purchased certain immoveable property in execution of his own decree and the sale was confirmed on the 5th of January, 1898. The appellant took no steps to obtain a sale certificate until the 15th of September, 1905, and a certificate was granted to him on the 21st of March 1906. On the 3rd of January, 1907, he applied under section 318 of the Code of Civil Procedure to be put in possession of the property which he had bought in 1897. The judgment-debtor objected that the application was barred by limitation. This objection was overruled by the court of first instance, but on appeal was sustained by the learned District Judge. The auction-purchaser comes here in second appeal. The only plea argued before us was that the application was not barred. In support of this contention, reliance is placed on the decisions of the Bombay High Court in *Basapa v. Marya*<sup>(1)</sup> and in *Kashi Nath Trimbak Joshi v. Duming Zuran*<sup>(2)</sup>. These decisions undoubtedly support the contention of the appellant. But with all deference to the learned Judges, who decided them, we do not find ourselves in agreement with them. We concur with what was said by the dissenting Judge KEMBALL in the earlier of the two cases. It is no doubt true that according to the language of section 318 of the Code, an application under that section can not be made until a certificate has been granted under section 316. But section 316 provides that the certificate is to bear, not the date on which it is actually issued, but the date of the confirmation of sale, and in our judgment the certificate must be deemed to have been granted on the date which it bears, just as a decree is deemed to have been passed not on the date on which it is signed, but on the date on which the judgment was pronounced. We are of opinion that although the grant of a certificate is a necessary preliminary to an application under section 318, such application will be

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(1) [1879] I. L. R., 3 Bom., 433. (2) [1892] I. L. R., 17 Bom., 228.

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barred under article 178 of the second Schedule to the Limitation Act, if not made within three years of the date on which the certificate is granted, which we take to mean the date it bears, that is the date of the confirmation of sale. If the auction-purchaser delays for upwards of three years in asking for the certificate to which he is entitled he does so at his own risk. It has been held by this court, See *Petition of Kishan Singh* (3) that there is no limitation for an application for a sale certificate. If we take it that his right to apply under section 318 arises not from the date which the certificate bears but from the date on which it happens to be issued, an auction-purchaser might come in with an application under section 318 twenty years after the date when title to the property vested in him. The view which we take now is supported by an unreported decision of our brother Richards in Execution Second Appeal No. 1401 of 1907, decided on the 12th of this month. For the reasons given above we are of opinion that whatever other right the appellant may have to enforce his title to the property which he bought, the court below was correct in holding that his application under section 318 is barred. The result is that we dismiss the appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

(3) [1883] W. N., 262.

## CHEDA LAL AND ANOTHER

*versus*

## GOBIND RAM \*

*Will, construction of—Rupia—"Money"—Presumption against partial intestacy.*

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1902.

April, 5.

STANLEY, C. J.  
BURKITT, J.

In the absence of explanatory context a word such as 'money' should be construed in its strict sense, but terms which in their strict and proper signification apply to a particular species of property may be held to embrace the general personal estate of a testator where the latter has shown a clear intention to make a complete disposition of his property.

The Court always leans against so construing a will as to make a testator die partially intestate. Where therefore it appeared that a testator did not intend to die intestate as to any portion of his property and made certain dispositions with regard to "my money (*rupia*) and the money due to me under bonds which may be realised," *held*, that he intended the word 'money' (*rupia*) should be synonymous with the words *turka* (heritage) and *jaidad* (estate) which he had used in the earlier part of the will. *Cadogan v. Palagi*, L. R., 25 Ch. D., 154, referred to.

FIRST APPEAL from the decree of Shaikh Maula Baksh, Officiating Subordinate Judge, of Bareilly, decreeing the suit in part.

Suit for recovery of moveable property.

The Subordinate Judge, decreed it partially.

Defendants appealed.

The will, which was the subject of construction in this appeal, ran as follows:—"I, Bhawani Prasad, son of Ganga Prasad, caste Agarwal, resident of Bareilly, Mohalla Sahukara, do hereby declare that, as life is uncertain in this temporary world, especially in the case of an old man like myself, who has attained the full measure of his allotted age, therefore, with a view of adjusting my monetary dealings, namely, the debts due to me under bonds and decrees, I make this arrangement and will:—So long as I live, I myself will be the sole owner of the debts due to me, and I have and will have full power to recover and make arrangements

\* F. A. 110 of 1899.



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for the recovery of the debts. My nephews (brother's sons) Ram Chandar and Dina Nath, sons of Gobind Ram, are separate from me, they have always been troubling me and there is an ill-feeling between them and me. Although, according to Hindu Law, they are entitled to inherit my estate after my death, yet owing to this ill-feeling and enmity between us, I do hereby exclude them from inheriting my estate for the above reasons, and I donot wish to give them a single shell from my property. Therefore my nephew (sister's son) Cheda Lal, son of Makund Ram, caste Bakkal, and Joti Prasad, son of Ganesh Prasad Brahmin, residents of Bareilly, Mohalla Sahukara, who are very fond of me and I am pleased with them, should, after my death have all my funeral ceremonies performed with my money and also with the money due to me under bonds which may be realised, and after my funeral ceremonies they should (also) have my *barsi* and *chaubarsi* performed. If any money is left after having the above-mentioned ceremonies performed it may be laid out on some religious purpose or in building a *thakurdwara* (temple) by which my soul may be benefited and which is proper according to Hindu Law. But my nephews (brother's sons) aforesaid, neither have nor shall have any right whatever in my before-mentioned property. I will have a right, during my life-time to modify this will. Hence I have executed this will that it may serve as evidence." Here follow details of the property.

*R. Malcomson*, for the appellants.

*Baldev Ram Dave*, (for *Sundar Lal*), for the respondent.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—This suit was instituted by Gobind Ram, the surviving brother of one Bhawani Das, who died on the 7th September, 1898, to recover from the defendants Cheda Lal and Joti Prasad certain moveable property which belonged to Bhawani Das at his death. The defendants claim to be entitled to possession of the property in question under the provisions of a will alleged to have been executed by the deceased on the 9th of March, 1888. The plaintiff in his plaint alleged that this will was a fabricated will, and he claims the property as the surviving member of a joint

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Hindu family consisting of Bhawani and himself. The learned Subordinate Judge found that the alleged will was a genuine will but he held that upon the construction of it the property in dispute did not pass to the defendants but was undisposed of. He also found that the plaintiff Gobind Ram and Bhawani were not members of a joint family but were separate. The will contains the following provisions: after a recital that his nephews Ram Chandar and Dina Nath, the sons of Gobind Ram, were separate from him, that they had always been troubling him and that there was an ill-feeling between them and him, and a recital that according to Hindu Law these nephews would inherit his estate after his death, the testator thereby excluded them from inheriting his estate and "did not wish to give them a single shell from his property." The will then provides that the defendants, the testator's nephew (sister's son), Cheda Lal, and Joti Prasad, son of Ganesh Prasad, Brahmin who were fond of him and with whom he was pleased, should after his death have all his funeral ceremonies performed with "my money and also with money due to me under bonds which may be realised, and after my funeral ceremonies they should also have my *barsi* and *chaubarsi* performed." Then follows a direction that "if any money is left after the performance of the above-mentioned ceremonies, it must be laid out on some religious purpose, or in building a *thakur-dwara* (temple), by which the testator's soul may be benefited and which was proper according to Hindu Law." Then there is the following direction: "But my nephews aforesaid (brother's sons) neither have nor shall have any right whatever in my before-mentioned property," which reiterates the determination of the testator to exclude these nephews from participating in his estate. Possession of all the moveable property of the deceased was made over by the Collector to the defendants as the parties entitled to it under the will which was found amongst the testator's papers. The plaintiff, though he alleged that the will was a fabricated document in the court below, before us on appeal does not dispute its validity, but he alleges that under the terms of the will only *money* in the restricted signification of the word passed to the defendants and he claims the rest of the

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deceased's property consisting of articles of silver and gold, brass and other metals, wearing apparel, etc., as his heir. The testator appears to have considered that the plaintiff's sons would inherit his property under Hindu law. He may have thought that his brother would predecease him. On the part of the defendants the contention is that the will was a disposition of the entire property of the deceased, and that they are the universal legatees of it upon the trusts mentioned in the document. There is no doubt that in the absence of explanatory context a word such as "money" should be construed in its strict sense, but terms which in their strict and proper signification apply to a particular species of property, as in this case *rupia*, have been held to embrace the general personal estate of a testator. The word "money," the equivalent of *rupia* (*rupees*), is often used in a vague sense as denoting a man's personal or moveable property and it has been so interpreted in several cases. This has been done in cases where a testator has shown a clear intention to make a complete disposition of his property an intention which could only be carried out by giving a wide interpretation to the word "money." We have been referred to an authority which illustrates this, namely, the case of *Cadogan v. Palagi* <sup>(1)</sup>. In that case, the testatrix who was possessed of cash, securities, lease-holds, furniture and effects, by her will gave one half of the *money* of which she was possessed to her sister Honoria Frances Cadogan and directed that the remainder should be divided equally between certain other sisters and after them to their children. It was held that in construing a will no absolute technical meaning should be given to such a word as "money"; the meaning of which must depend upon the context, if any, which can explain it and upon such surrounding circumstances as the Court can take into consideration. It was, in determining the construction, held in that case that the word *money* passed all the personal estate. Now if anything is clear in the will before us, it is that the testator did not intend to die intestate as to any portion of his property. It is to be observed that the Court always leans against so construing

(1) L. R., 25 Ch. D., 154.

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a will as to make a testator die partially intestate. This is what we are asked to do in this case. In the opening words of the will the testator declares that he excludes his nephews (brother's sons) from inheriting his "estate"—the word which is translated "estate" is the word *turka*, i.e., 'what is left behind'—and that he does not wish to give them a single shell from his "property"—the word used for property being *Jaidad*. Then follows the direction in favour of the two defendants and in this the operative part of the will, he directs that they shall perform his funeral ceremonies, with his, the testator's money and also with the money due to him under bonds etc. At the end of the will details of the bonds and decrees outstanding in his favour are given. Now it appears to us that when he used the words "my money" coupled with the words "also money due to me" he meant by the words "my money" something outside and other than the bonds and decrees stated in the details contained in the will. What was that money? Undoubtedly as we have said he did not intend to die partially intestate, and it appears to us that when he uses the words "my money" he intended that the word "*rupia*" (money) should be synonymous with the words *turka* and *jaidad* which he used in the earlier part of the will, and so dispose of by his will whatever he should leave behind him. In the last direction in the will that his nephews should have no right whatever in his property before mentioned, the testator emphasises his determination to make a complete disposition. We cannot disregard the very clear intention of the testator to dispose of all his property which appears upon the face of this document. For this reason, we think that the learned Subordinate Judge was entirely in error in the construction which he placed upon the will and that the defendants are entitled to hold all the testator's property upon the trusts and for the purposes declared by the will. We are not asked to state whether the dispositions of the will in favour of religious purposes or for the building of a *thakurdwara* are valid or not. This is a matter which may have to be determined but with which we have nothing to do in the present appeal; all that we say is that having regard to the provisions of the will, the plaintiff is not en-

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titled to dispossess the defendants of the testator's property. We, therefore, allow the appeal, set aside the decree of the Subordinate Judge, and dismiss the plaintiff's suit. As to costs, if the plaintiff had instituted his suit for the purpose of determining the true construction of the will, we should have been disposed to allow him his costs in both courts out of the estate, because no doubt upon the terms of his will there is a fair question for argument, but inasmuch as he impeached the will in the court below and alleged that it was a fabricated document we cannot see our way to allow him costs in the court below, but we shall allow him his costs of this appeal to be paid out of the estate. The defendants will be entitled to the costs of defending the suit in the court below, and also of this appeal out of the estate.

*Appeal allowed.*

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June, 5.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

## JUMAI KANJAR

versus

ABDUL KARIM KHAN.\*

*Limitation Act (XV of 1877), schedule II, article 179, clause 5—Decree—Execution—Application for execution—Code of Civil Procedure (Act XIV of 1882), section 248—Notice—Date of the order.*

The date of issuing a notice under section 248 of the Civil Procedure Code is the date on which the court orders the issue of notice and not the date on which the notice is actually issued. The limitation therefore under article 179, clause 5, of the second schedule to the Limitation Act (XV of 1877) runs from the former date.

EXECUTION SECOND APPEAL from a decree of S. Mahomad Ali Esq., District Judge of Mirzapore, confirming a decree of Behari Lal Merh Esq., Munsiff of Mirzapore.

This was a decree-holder's appeal. The application for execution which was the subject of controversy was dated the 24th January, 1907. It appears that the last application for execution was filed on the 15th January, 1904. On the

\* E. S. A. 1180 of 1907.

21st January, 1904, on this application notice under section 248 of the Code of Civil Procedure was ordered to be issued. The notice was actually issued on the 25th January, 1904.

The learned Munsiff dismissed the application as being barred by limitation, holding that time began to run from the date of making the order and not from the date of actually issuing the notice. The learned District Judge on appeal confirmed the decree of the first court.

Decree-holder appealed.

*Iswar Saran* (with him *Madan Mohan Malaviya*), for the appellant, contended that the words 'the date of issuing notice' under section 248 Civil Procedure Code, in Art. 179 clause 5, Limitation Act, meant the date of actually issuing the notice and not the date on which the order to issue the notice was made. He pointed out that the rulings of the Allahabad High Court were against his contention.

*Udit Narain v. Rampartap Singh*, [1881] A. W. N., First Edition p. 147 and 2nd Edition p. 120.

*Baldeo and another v. B. Harrison*, [1890] A. W. N., p. 244.

He admitted that these two rulings were against him. But he submitted that the Calcutta and Madras High Courts were in his favour. He referred to :—

*Kadaréssur Sen Bahor v. Mohim Chandra Chakrawarti*, [1902] 6 C. W. N., 656.

*Ratan Chand Oswal v. Deb Nath Barua*, [1906] 10 C.W.N., 303.

*Cheruvath Thalangal Bapu v. Nerath Thalangan Kanaran*, [1906] I. L. R., 30 Mad., 30.

He referred to :—

*Hari Ganesh and another v. Yamunabai*, [1897] I. L. R., 23 Bom., 35.

*Damodar Shalig Ram v. Sonaji*, [1903] I. L. R., 27 Bom., 622.

*Govind valad Dhond Patil v. Dada valad Udaji Patil*, [1906] I. L. R., 28 Bom., 416.

*Jacob Simeon*, (for the respondent) mentioned

*Dhonkal Singh v. Phakkar Singh*, [1893] I. L. R., 15 All., 84.

*Iswar Saran* further submitted that the language used in the article in question led one to the conclusion that the

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KHAN.

*Aikman, J.*

Legislature meant the date of the actual issuing of the notice. He referred to Articles 160 A. 162, 173 as supporting his interpretation.

*Jacob Simeon*, for the respondent, was not heard.

The judgment of the Court was delivered by

AIKMAN, J.—This is a decree-holder's appeal. The courts below have held that the present application to execute is barred by limitation. The application to execute was presented on the 24th of January, 1907. The last preceeding application was made on the 15th of January, 1904. On the 21st of January, 1904, the court passed an order that notice should issue to the judgment-debtor under section 248 of the Code of Civil Procedure. The notice was actually issued on the 25th January, 1904. Article 179 of Sch. II of the Limitation Act allows three years from "the date of issuing notice under the Code of Civil Procedure, section 248." If the date of issuing notice be taken to be the date on which it is actually issued, the application is within time. But if it be taken to be the date on which the court passed an order for issue of notice under section 248, the application is too late." There is a great conflict of opinion in the different High Courts as to the meaning of the words quoted above. In this conflict we are bound to follow the rulings of our own court, and the learned Vakil for the appellant admits that those rulings are against him. We accordingly hold that this appeal must fail, and we dismiss it with costs, including fees on the higher scale.

I. S.

*Appeal dismissed.*

BITHAL DAS AND OTHERS  
*versus*  
 JAMNA PRASAD AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), sections 244, 285—Ex parte decree—Money realised by decree-holder—Decree set aside—Decretal amount reduced—Refund.*

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B obtained an *ex parte* decree against J for 19041 and realised the amount. The decree was set aside and the decretal amount was reduced by about Rs 1,800. The judgment-debtor applied for refund of that amount. *Held*, that the remedy of the judgment-debtor to realise that amount was both by a suit and an application and he could avail himself of any of the two remedies. *Collector of Meerut v. Kalka Prasad*, I. L. R., 28 All., 665, *Shiam Sundar v. Kaisar-zamani*, I. L. R., 29 All., 143, applied. *Shaman Pershad v. Hurro Pershad*, 10 M. I. A., 203, referred to

When an *ex parte* decree is set aside the parties are relegated to the position they were in before the decree was passed. Where before the passing of the decree there was an injunction against the defendant from realising certain money from court the injunction was revived when the decree was set aside.

APPEAL against the order of Babu Sheo Prasad, Subordinate Judge of Agra.

Application for refund of money.

The facts appear from the judgment.

*Sarat Chandra Chaudhri* (for *J. N. Chaudri*), for the appellants.

*Sital Prasad Ghosh*, for the respondents.

The judgment of the Court was delivered by

BANERJI, J.—The facts out of which this appeal arises are these. On the 7th of October, 1901, an *ex parte* decree, on a mortgage, was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in court to their credit. After the passing of the *ex parte* decree the appellants withdrew from court

*Banerji, J*

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Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th July, 1904. The suit was retried and on the 17th of September, 1904, the court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December, 1906. On the 17th of September, 1907, the respondents made an application to the court for refund to them of Rs. 1,804 being the difference between the amount, realized by the decree-holders and the amount subsequently decreed by the court, together with interest and costs.

The court below has granted the application. Hence this appeal.

Two contentions have been urged before us;—(1) that the remedy of the respondents was a suit and not an application and (2) that the application is time barred.

As regards the first point we think that the respondents were competent to make an application for the refund of the money. The decree originally passed was superseded by the subsequent decree made in 1904. As observed by their Lordships of the Privy Council in *Shaman Pershad Roy Chowdhry v. Hurro Pershad Chowdhry*,<sup>(1)</sup> "If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded and, as their Lordships conceive, is recoverable either by a summary process or by a new suit or action." The respondents were therefore entitled to apply for a refund of the money and were not bound to bring a separate suit. That they are entitled to the money can admit of no doubt and the only question is as to the form of the remedy to which they must resort for obtaining relief. The principle of the rulings of this court in the cases, *Collector of Meerut v. Kalka Prasad* <sup>(2)</sup>, and *Shiam Sundar Lal v. Kaisarzanani Begam* <sup>(3)</sup> applies to this case.

As to the question of limitation, the respondents did not become entitled to the money until the decree of the 17th of September, 1904, was passed. It is true that on the *ex parte*

(1) 10 M. I. A., 203.

(2) [1906] I. L. R., 28 All., 665.

(3) [1906] I. L. R., 29 All., 143.

decree passed on the 7th of October, 1901, being set aside, they might have applied to the court to direct the appellants to refund the sum of Rs. 19041, which they had withdrawn from the court in pursuance of that decree, but as an injunction had been issued restraining them from withdrawing the money until the final decision of the suit they could not apply for payment of the amount to them either by the court or by the appellants. This distinguishes the present case from the case of, *Harish Chandra Shaha v. Chandra Mohan Das* (4). Upon the *ex parte* decree being set aside, the parties were relegated to the position in which they were before the decree was made. Therefore the injunction, which had been issued to the respondents under section 492 revived and remained in full force, and the respondents could not have asked for payment of the money. As we have said above, it was only when the suit was finally decided and the decree was made for a smaller sum than that which the appellants had taken from the court that the respondents' right to a refund accrued. As their application for refund was made within three years of that date, the application is not time barred. We dismiss the appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

(4) [1900] I. L. R., 28 Cal., 113.

## CHARNA AND OTHERS

*versus*

## BANS LAL AND OTHERS.\*

*Lessor and lessee—Contract of lease—Suit for specific performance—Suit for possession of immoveable property—Limitation Act (XV of 1877), arts. 113, 144, sch. II.*

Where the lessors contracted to give possession to the lessees but did not do so, and the lessees brought a suit for possession, more than three years afterwards, *held*, that the suit was one for the specific performance of the contract and was governed by article 113, and not article 144, schedule II, Limitation Act and the suit was barred by time.

\* F. A. F. O. 37 of 1907.

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March, 3.  
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APPEAL from an order of Babu Daya Nath, Subordinate Judge of Farrukhabad, reversing the decree of Munsiff of Kanauj.

Suit for possession of a plot of agricultural land under a lease with effect from 1308 Fasli.

The defendant executed a lease of agricultural land for 5 years in favour of the plaintiffs but did not give them possession. More than three years after the lease the plaintiffs brought this suit for possession. The court of first instance dismissed the suit as time barred but the lower appellate court reversed the decree and remanded the case for trial on the merits.

Defendants appealed.

*Sarat Chandra Chaudhri* (for *S. C. Banerji*), for the appellants, submitted that the suit was virtually one for specific performance of the contract to lease. The plaintiffs never obtained possession and their right to possession sprang under the lease. Three years having elapsed from the date when they became entitled to enforce the contract, the suit was barred under art. 113, sch. II, Limitation Act. He relied on

*Muhiuddin Ahmad Khan v. Majlis Rai*, [1884] I. L. R., 6 All., 231.

*Gulzari Lal*, for the respondents, contended that the suit was governed by article, 144, sch. II, Limitation Act. The suit was one for possession against a trespasser. The case cited by the other side was distinguishable. The contract was an executed one and nothing remained to be done to perfect the title.

*Sarat Chandra Chaudhri*, in reply, submitted that to apply article 144 would lead to a grave anomaly, for if after getting possession the plaintiffs had been ousted, and then they had brought a suit to recover possession, they would have only six months, the land being an agricultural holding; whereas if they never got possession and came to the Civil Court, they would have 12 years. The lease was the plaintiffs' title, and they must bring a suit within the statutory period if they sought to enforce that title.

The judgment of the Court was delivered by

*Aikman, J.*

AIKMAN, J.—The plaintiff respondents came into court on the allegation that certain of the respondents had given them a lease of a particular field with effect from 1308 Fasli, and

that those defendants had not given the plaintiff possession under the lease. It appears from the pleadings that the land-holders let the field which they had undertaken to give to the plaintiffs to the other defendants who are in possession. The court of first instance dismissed the suit as barred by limitation. On appeal the learned Subordinate Judge held that the suit was within time and remanded the case for decision on the merits. Against that order the present appeal has been preferred. In our opinion, the decision of the court of first instance was right. The land-holders contracted to give plaintiff possession of a certain field. Instead of doing so they gave possession of the field to other tenants. The plaintiffs wanted for five years and then brought the suit out of which this appeal arises. It appears to us that, as held by the first court the suit was one for specific performance of contract and falls within article 113 and not article 144 of the second schedule of the Limitation Act. We allow the appeal, and setting aside the order of the court below, restore the decree of the court of first instance. The appellants will have their costs here and in court below.

S. C. C.

*Appeal decreed.*

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IN THE MATTER OF THE PETITION OF  
MAHADEO PRASAD.

*Court Fees Act (Act VII of 1870), section 7 (e) Cl. IX p. Sch. I Art I applies to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in appeal.*

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*Held*, that the Court-fee in an appeal arising out of a suit for foreclosure is payable on the subject-matter in dispute in appeal and not on the principal money secured by the mortgage. *Nepal Rai v. Debi Prasad*, I. L. R., 27 All., 447, and *Reference under Court Fees Act*, I. L. R., 29 Mad., 367, followed.

Reference by the Taxing Officer under section 5 of the Court Fees Act to the Taxing Judge.

A first appeal having been presented to the Stamp Reporter, he submitted the following report :—

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" This appeal has arisen out of a suit for foreclosure. The principal money expressed to be secured by the instrument of mortgage was Rs. 6,000. The defendant pleaded *inter alia* that the mortgage debt had been paid off from the usufruct of the property and that only 4 annas and not five annas 4 pie share had been mortgaged.

Upon the trial of the suit the lower court passed a decree for foreclosure in plaintiff's favour subject to defendant's right of redemption on payment of Rs. 8,664 within six months from the date of the decree, and failing that the entire property mortgaged; namely, 5 annas 4 pie was to be foreclosed and the defendant's right of redemption extinguished.

The defendant appeals to this Hon'ble Court and has paid Court-fees on the principal mortgage money.

Having regard to the rulings of *Nepal Rai v. Debi Prasad* (W. N., 1905 p. 40), *Reference under Court Fees Act*, 1870, (I. L. R., 29 Mad., p. 367) and to the grounds raised in the memo. of appeal, it appears that the value of the subject-matter in dispute in appeal for the purposes of the Court-fees, is Rs. 8,664, the amount found to be payable under the mortgage in dispute, and Rs. 323, costs, total Rs. 8987. As to costs, a distinct ground having been taken in the memo. of appeal, an additional Court-fee is payable thereon (*Vide* W. N., 1901 p. 21). This being so, a fee of Rs. 435 is payable. Rs. 315 having been paid, there is therefore a deficiency of Rs. 120 to be made good by the defendant appellants for this Court.

The report having come before BANERJI, J., as a Judge receiving applications, he made the following order:—

"Mr. Surendra Nath Sen objects to the office report. Lay before the Taxing Officer."

The Taxing Officer on the 3rd of May 1908 made the following reference to the Taxing Judge:—

"I have the honour to refer for decision under provisions of section 5 of the Court Fees Act the following question.

The plaintiffs sued for foreclosure. The court of first instance gave him a decree subject to the defendant's right to redeem on the payment of Rs. 8987 within 6 months.

This sum of Rs. 8987 is made up of Rs. 6,000, the original sum secured, Rs. 2,664 interest, and Rs. 323 costs.

The defendant mortgagor appeals. His plea in appeal as in the court of first instance is that the sum secured has been satisfied out of the usufruct. He stamps his appeal under Court Fees Act section 7 (1X) with reference to Rs. 6,000 the amount secured by the mortgage. The office report that the appeal should be stamped *ad valorem* on Rs. 8,987 according to Article 1 of the first Schedule to the same Act. Four Rulings have been cited. One of these which was delivered by the present Chief Justice is reported in W. N. 1905 at page 40.

This ruling was agreed with by a Divisional Bench of the Madras High Court in case reported in I. L. R. Madras XXIX at page 368. In the Allahabad case, the plaintiff had sued for redemption. They obtained a decree subject to the payment of Rs. 1,555-14-0. They considered that they were entitled to redemption on the payment of the sum smaller by Rs. 288-11-0 than Rs. 1,555-14-0. It was held that the appeal should be stamped *ad valorem* on Rs. 288-11-0.

In the case for decision now the defendants prayer in appeal is that they are entitled to redeem without making any payment, that is to say, they are entitled to redemption on the payment of a sum less by Rs. 8,987 than the sum decreed by the court of first instance. On the principle laid down in the above ruling I think the report of the office is correct.

Two rulings have been quoted by the learned Counsel, for the appellants. One is a case decided by Sir John Edge, reported in I. L. R., All., XIII at page 94. The ruling in this case has been dissented from in the two cases quoted above. But as far as the present matter goes, I do not think that it is opposed to the view of the office. Sir John Edge limited his ruling to appeals in which it was impossible to value the subject-matter, *e. g.*, an appeal asking for redemption subject to the payment of an unknown amount. In the present appeal, the right to redeem is not contested, and the amount the appellant seeks to avoid paying is a definite sum. The remarks in the last paragraph of the judgment appear to me to deal with a case like the present, and to fully sup-

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port, the view that the appellant should be required to pay on Rs. 8,987.

The second ruling referred to on behalf of the appellant is reported in I. L. R., 10 Bombay at page 41.

I see however from the report of the Taxing officer in that case that the appeals there in question "re-opened the whole question of mortgage."

This the present appeal does not do. Therefore I do not think it applied to the present case."

The following order was passed by

*Aikman, J.*

AIKMAN, J.—I agree with the judgment of learned Chief Justice in *Nehal Rai v. Debi Prasad*,<sup>(1)</sup> which is against the appellant's contention. In my opinion, the view expressed by the Taxing officer is right.

(1) [1905] A. W. N., 40.

GHULAM SABIR

*versus*

NARAIN PRASAD.\*

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*June 22.*

AIKMAN, J.

*Court Fees Act (Act VII of 1870), section 7—Court-fee—Suit for possession under lease—whether it is a suit for specific performance.*

A suit for possession by the lessee of land comprised in a lease is not a suit for specific performance of the contract of lease, and the Court-fee payable on the plaint is the same as in a suit for possession. But the memorandum of appeal must be stamped according to the value of the relief asked for, which may be the lease money.

Reference under section 5 of the Court Fees Act, VII of 1870.

The plaintiff in this case brought a suit for possession of a grant in villages Firozpur alias Bagawala and Nokra under a lease dated the 22nd of September, 1904, bearing an annual rent of Rs. 4,522, and for recovery of Rs. 3,000 as damages. The total valuation of the claim was laid at Rs. 7,522. He paid a court-fee of Rs. 385 on the plaint.

\* Stamp Reference in F. A. No. 186 of 1907.

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The court of first instance dismissed the plaintiff's claim, and he has appealed to this Hon'ble Court and paid Rs. 385 as court-fees.

I beg to submit that the suit not being a suit governed either by Sec. 7 Cl: X(c) or Cl: X; falls under section 7 Cls V and (b) of Act VII of 1870, and the court-fee payable on the petition of plaint and the memo. of appeal should therefore be calculated on five times the Government revenue and the amount of damages claimed. The Government revenue assessed thereon is nowhere to be found on the record, the learned Counsel for the plaintiff appellant may be asked to furnish the same ?

The counsel for the appellant having objected the stamp reporter made the following report. The learned counsel for the appellant has objected to the correctness of the office report and I therefore refer the case under section 5 of Act VII of 1870 for decision of the Taxing Officer.

In reply to the objection I beg to submit that section 7 paragraph X cl: (c) has no application to the present case inasmuch as it is not a case for specific performance of a contract but is in fact a suit for enforcement of a right flowing from an executed contract. The expression "specific performance" as applied to suits of that nature presupposes an executory as distinct from an executed agreement. In this connection, I rely upon a *dictum* of Lord Selborne, Lord Chancellor in the case of *Wolverhampton and Walsall Railway Co. versus London and North-Western Railway Co.* (L. R., 16 Eq. p. 433). At page 439 of the Report, nine lines from the top, his Lordship is reported to have observed:—"The common expression, 'specific performance' as applied to "suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed". It is a matter of every day occurrence that the suits for possession as mortgagee based upon a mortgage-deed are treated as ordinary suits for possession falling under section 7 para V of Act VII of 1870. *Ex hypothesi* the suits for possession as lessee could also fall under the same



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clause. If the contention of the learned Counsel, for the appellant be correct, then I cannot help submitting that almost every case arising out of a contract will be a suit for specific performance and there will hardly be any case to which the provisions of Court Fees Act other than those of clause X governing the several classes of cases based on contracts will be applicable.

The counsel for the appellant objected to the report on the ground that he did not find any thing in the Specific Relief Act which limited the application of the Act to executory contracts.

The following reference was thereupon made by the Taxing officer.

The point at issue in this reference is whether a suit to obtain possession on a lease should for the purposes of court-fee be treated as a suit of the nature referred to in section 7. X. c. or as a suit for possession for which the fee is prescribed by section 7. V. of the Court Fees Act. The learned counsel, for the appellant admits that according to English Law as laid down in the judgment of Lord Selborne quoted by the Stamp Reporter, the suit would not be stamped as a suit for specific performance of a contract of lease, but he states that he does not find anything in the specific Relief Act which limits the application of the act to executory contracts.

I do not think that this contention is relevant to the matter at issue. The argument of the office is not as to the extent of the application of the Specific Relief Act but merely as to whether the words "specific performance of a contract" in section 7 X. c. of the Court fees Act refer to a suit for specific relief on an executed contract, as well as to a suit on an executory agreement for the execution of a formal contract. If they do then suits of these two classes must be stamped in the same manner. The result would be that..... to take the case of a contract of sale (section 7. X. c.) a suit on an executory agreement for execution of a sale-deed would have to be stamped in the same manner as a suit to obtain possession under an executed deed of sale. I would submit that in the first place, it is difficult to believe that both these classes of cases are referred by the same words and that in

the second place it is highly improbable that the Legislature intended suits of such widely different nature to be stamped on the same principles.

I have been unable to find any authorities bearing on the question of the court-fee to be paid on suits of this nature, but in several cases questions have arisen as to what article of the Limitation Act is applicable. These seem to me to support the view set forth by the office. The first case I would refer to is an Oudh case, reported in O. C. X page 218. In the judgment in that case at page 222 Mr Chamier quotes as applying to India the very remarks by Lord Selborne, which the learned counsel, for the appellant admits as showing the law in England to be contrary to the view he sets forth. A few lines above the quotation from Lord Selborne, Mr. Chamier draws attention to the distinction pointed out by Sir E. Fry between a suit for specific relief on executed contracts, and suits for specific performance of executory contracts".

Later on in the judgment, a ruling of the Privy Council and several rulings of Indian High Courts are referred to, and it is pointed out that these rulings adhere to the distinction laid down in English law, and in interpreting the words "specific performance of a contract" used in article 113 Schedule II of the Limitation Act limit them to suits on executory agreements, with the results that while the period of limitation for suits of this nature is only 3 years, the period of limitation for suits for possession in virtue of a title conferred by an executed contract is held to extend under articles 136 or 144 (as the case may be) to 12 years.

I would submit that this suit being of the latter nature is not governed by article 113 Schedule II of the Limitation Act.

Therefore as far as this Act is concerned the words "specific performance of a contract" do not apply to it." From this I would argue in default of any indication the other way that the same words when used in the Court Fees Act do not apply to it.

In connection with the High Court rulings referred to above I would particularly draw attention to the one reported in XXIII Allahabad at page 285. At the 6th line of page 288 in the report of the judgment, it is specifically held that

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"a suit based on a sale-deed is not a suit for specific performance of the contract of sale."

"Lastly on reading through the lease in question in the present appeal, I find nowhere any covenant to put the lessee in possession. Therefore I think that the present appeal must be considered as being one for possession and stamped with reference to the subject-matter.

There is one further point to which I wish to draw attention and that is that in a case reported in W. N. 1905 p. 40, it was held that section 7, IX of the Court Fees Act does not apply to appeals. This question has not been raised by either side. But if by parity of reasoning a similar view is taken of section 7, X, of the Act, then none of the foregoing matters need be decided, and the appeal must be stamped *ad valorem* according to article I Schedule I of the Act."

*A. E. Ryves*, for appellant objected to the report on the ground that the claim fell within the provisions of section 7, clause X (c) of the Court Fees Act.

*Satish Chandra Banerji*, for the appellant then referred to F. A. F. O. No. 37 of 1907, decided by AIKMAN and KARAMAT HUSAIN, JJ., on the 3rd of March, 1908.

The following order was passed by

*Aikman, J.*

AIKMAN, J.—The unreported case cited by the learned advocate in his note of 6th instant is in his favour, but though I was a party to the decision, I now see reason to doubt its correctness, and it is opposed to the rulings cited in support of the opposite view. I therefore hold that the suit is not one for specific performance. But I cannot agree with the office in thinking that the appeal must be stamped as if it claimed the property itself instead of only lease-hold rights. The opinion of the office would be correct according to the Court Fees Act, if it were a plaint. But, having regard to the ruling in *Nepal Rai v. Debi Prasad*,<sup>(1)</sup> I think the memorandum of appeal must be stamped according to value of the relief asked for. As the lease was for 7 years only I think its value may be taken to be equivalent to the lease money set forth in the plaint. I therefore decide that the memorandum of appeal is properly stamped.

(1) [1905] A. W. N., 40.

## BUDH SINGH

*versus*

## GOPAL RAI AND OTHERS.\*

*Pre-emption—Wajib-ul-arz, construction of—Custom or contract—  
Partition—Cosharer.*

CIVIL.

1908.

July, 13.

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

Where a *wajib-ul-arz* opened with a declaration that the zamindars and khewatdars, agreed that up to the term of settlement and in future to the termination of the next settlement they should abide by the following conditions and act upon them, and one of the conditions related to pre-emption, *held* that the record was one of contract and not custom.

Where a *wajib-ul-arz* recognised a right of pre-emption in favour of cosharers descended from a common ancestor, and by reason of a subsequent partition, the pre-emptor, though descended from the same stock as the vendor, had ceased to hold any share in the *mahal*, portion of which was the subject of sale, *semble* if the right recorded was one existing by custom, the plaintiff would be entitled to pre-empt.

APPEAL against the decree of Babu Girdhari Lal, Officiating Subordinate Judge of Saharanpur.

Suit for pre-emption.

Question of construction of two *wajib-ul-arzes*.

The material provisions of the *wajib-ul-arz* of 1867 ran thus :

“*Wajib-ul-arz i. e., dastur dehi* of mauza Gumti,” pargana Sultanpur, tahsil Nakur, District Saharanpur.

We Narain Das Mahajan, resident of Chilkana, lambar-dar, Gulab Khan, Nasib Khan, Karim Bakhsh, Must. Miran wife of Kallu, Shadi, Jasamo, Tajja, Munira, Dhumi and Masite, caste Rajput, and Fakira, sect Afghan, residents of mauza Gumti, khewatdars of the aforesaid village, do declare as follows :—

At the recent settlement of this village for 30 years *i.e.*, from July 1269 F. up to June 1297 F., a uniform annual *Jama* of Rs. 564 was fixed by the Government. We, the

\* F. A. 296 of 1906.

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zamindars, agree that up to the term of the settlement and in future to the termination of the next settlement we shall abide by the following conditions and act upon them:—

\* \* \* \* \*

*Section 6.*—Of the transfer of property by sale or mortgage.

Every co-sharer has power to transfer his share. If any co-sharer wishes to transfer his share, he can do so, first to his own brother, and, in case of refusal by him, all his co-sharers, descended from a common ancestor, have a right to it. If any dispute arises as regards the price, the price shall be determined in the presence of the presiding judge by appointment of the arbitrators. If none (of them) will take it for the price fixed by the arbitrators, then he can transfer it to a stranger. The rule relating to sale also applies to mortgage."

\* \* \* \* \*

The *wajib-ul-ars* for 1297 Fasli did not contain any specific provisions regarding the above matter, but, after providing for various other matters, said, "for the remaining village customs see the *wajibulars* prepared in 1867."

The plaintiff was uncle of vendor the defendant, but there was a perfect partition which came into effect on July 1, 1905, and the plaintiff then ceased to be a shareholder in the vendor's *mahal*. The vendees were strangers. The Subordinate Judge held that the *wajib-ul-ars* was evidence of a pre-existing custom, but by reason of the partition the plaintiff ceased to be a *jaddi* co-sharer and could not pre-empt. He dismissed the suit.

Plaintiff appealed.

*S. Abdul Raoof*, for the appellant, contended that the partition did not affect the plaintiff's right, and relied upon

*Auseri Lal v. Ram Bhajan*, [1905] I. L. R., 27 All., 602.

*Janki v. Ram Partap Singh*, [1905] I. L. R., 28 All., 286.

*S. C. Banerji*, for the respondents, contended that the earlier *wajib-ul-ars* recorded only a contract, which had come to an end with the settlement.

*Joti Prasad v. Badri Das*, S. A. 1109 of 1905, decided on February 27, 1908, 5 A. L. J., 100.

*Tota v. Sheonarain*, F. A. F. O., 135 of 1898, decided by KNOX, and AIKMAN, JJ., on June 15, 1899.

On the effect of partition he cited

*Dalganjan v. Kalka*, [1899] I. L. R., 22 All., 1, 28, 31, 32, F. B.

*Gobind Ram v. Mashi-ulla*, [1907] I. L. R., 29 All., 295.

*S. A. Raoof*, in reply, referred to

*Baldeo Sahai v. Nagai Ahir*, [1906] 27 A. W. N., 17.

The judgment of the Court was delivered by

STANLEY, C. J.—This appeal arises out of a suit to enforce a claim for pre-emption. The property which is the subject of the sale lies in a *mahal* of the village Gumti in parganah Sultanpur, in the Saharanpur district, which village was partitioned in the year 1905. The plaintiff relies upon the *wajib-ul-ars* of the village prepared in the year 1867 and upon an alleged adoption of the provisions of that *wajib-ul-ars* in the later *wajib-ul-ars* of 1890. The question before us appears to depend upon the fact whether or not the *wajib-ul-ars* of 1867 is a record of right of pre-emption existing by custom. If it be such a record we are disposed to think upon the authorities that that right still continues to exist in the village. If, on the other hand, it is a record of right existing by contract then that right came to an end at the expiration of the settlement, and if it did come to an end at the expiration of the settlement, the language of the later *wajib-ul-ars* of 1890 would not perpetuate it. In the *wajib-ul-ars* of 1867 the names of the residents of the village, who are described as the *Khewat-dars* are mentioned, and they purport to declare that "they agree that up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Then follows a number of provisions and amongst others the following provisions as to pre-emption. "If any co-sharer wishes to transfer his share, he can do so, first, to his own brother; and in case of refusal by him, all his co-sharers, descended from a common ancestor, have a right to it." Now the pre-emptor Budh Singh is a paternal uncle of the vendor, and is also a co-sharer in the village, but he is not a co-sharer in the *mahal*, portion of which is the subject of the sale. If how-

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ever the right to pre-empt, recorded in this *wajib-ul-arz*, is a right existing by custom, then it would appear to us that the pre-emptor plaintiff appellant is entitled to pre-empt notwithstanding the fact that he has no share in the *mahal*, portion of which is the subject of the sale. In the later *wajib-ul-arz* of 1890, a number of matters are referred to but no mention is made of any custom of pre-emption whatever, but the following words are to be found in it:—"For the remaining village customs see the *wajib-ul-arz* prepared in 1867." The plaintiff relies upon this language and asks us to hold that it imports, into this *wajib-ul-arz* the provision as regards pre-emption set forth in the *wajib-ul-arz* of 1867. It would not be unreasonable to hold that the parties intended by this language to incorporate the provisions of the earlier *wajib-ul-arz* as regards the custom set forth in that document. But if the right of pre-emption created by it was one arising from contract and not existing by custom, it is obvious that that right would not be perpetuated by the incorporation in the later *wajib-ul-arz* of the *customs* existing in the village. The right was not a right existing by custom but a right arising from contract. Now the question as to whether or not the *wajib-ul-arz* of 1867 is a record of a custom or the record of a contract is one of very great difficulty. A strong argument may be based upon the language used in support of the view that it is a record of custom. We are, however, not disposed to set aside the decree of the court below unless we are clearly satisfied that it is erroneous. We do not agree with the learned Subordinate Judge in the reasons given by him for his decision, but after giving the best consideration we can, to the language of the *wajib-ul-arz* of 1867, we are unable to hold that it is a record of custom. This being so, the appeal fails and is dismissed with costs, including fees in this Court on the higher scale.

S.C.C.

*Appeal dismissed.*

NIJABAT ALI

*versus*

WAZIR ALI.\*

*Mahomedan Law—Shia School—Succession—Maternal uncle—father's  
cousin—preference between.*

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1908.

March, 28.

BANERJI, J.

According to the Shia School of Mahomedan Law a cousin of the deceased's father has no right of inheritance if a maternal uncle of the deceased exists, the general rule being that one who is related to the deceased in a near degree excludes the one who is more remote.

SECOND APPEAL against the decree of L. M. Stubbs Esq., District Judge of Saharanpur, confirming a decree of Babu Nihala Chandra, Subordinate Judge.

Suit for possession of property.

The facts appear from the judgment.

The courts below decreed the suit.

Defendant appealed.

*Muhammad Raoof* (for *Abdul Majid*), for the appellant.

*Ishaq Khan* (with him *Ghulam Mujtaba*), for the respondent.

The following judgment was delivered by

BANERJI, J.—This appeal arises in a suit relating to the estate of one Wali Muhammad, who died leaving him surviving the plaintiff, who is his maternal uncle. The defendant alleges himself to be the grandson of the brother of the great-grand-father of Wali Muhammad and asserted in the Court below that he was entitled to the estate of Wali Muhammad in preference to the plaintiff, the maternal uncle, on the ground that the deceased was a Sunni. It has been found that Wali Muhammad was a Shia and the claim of the plaintiff has been decreed by the courts below. It is urged in this appeal that even if Wali Muhammad was a Shia the appellant Nijabat Ali is entitled to a share in the inheritance. The question, therefore, is whether the maternal uncle of a deceased Shia

*Banerji, J.*

\* S. A. 1160 of 1906.



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v.

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*Banerji, J.*

excludes from inheritance the grandson of his great grandfather's brother. This question arises on the assumption that the relationship between the deceased and Nijabat Ali is what he alleges it to be, although it is denied on behalf of the plaintiff that any such relationship exists. Even if Nijabat Ali bears to Wali Muhammad the alleged relationship, it appears from the authorities of Mahomedan law relating to the Shia school that the plaintiff, who is the maternal uncle, would exclude him from inheritance. The general rule is that one who is related to the deceased in a near degree excludes one who is more remote. It is clear that a maternal uncle is nearer in degree to the father's cousin in the third degree. According to the Shia school uncles, paternal or maternal, exclude paternal or maternal uncles of the father, and necessarily the sons of the paternal uncles of the father—See Baillie's *Imamia*, p. 271. The maternal uncle is a consanguineous heir of the third class, and when he stands alone, he inherits the whole property (see p. 285, also p. 287). Assuming, therefore, that the defendant appellant is a cousin of the father of the deceased, he has no right of inheritance so long as the maternal uncle, the plaintiff, exists. I may observe that in the courts below, it was not the appellant's case that even if Wali Muhammad was a Shia the appellant would still have a right to a part of his estate. The appeal is, in my judgment, untenable and is accordingly dismissed with costs.

*Appeal dismissed.*

## UMRAO ALI KHAN AND OTHERS

*versus*

## ABDUL SUBHAN KHAN AND OTHERS.\*

*Stamp—Appeal in a suit for partition—Remand to carry out the partition—Appeal from order of remand—Court-fee payable on.*

In a suit for partition the plaintiffs claimed half. The Munsif found that they were entitled to half. On appeal the District Judge found that they were entitled to quarter, and remanded the suit for carrying out the partition. The plaintiff's appealed and challenged the decree on the merits but paid a court-fee of Rs. 2. *Held*, that the plaintiffs should have appealed from the decision as from a decree and the memorandum of appeal must be stamped as such. *Kedar Nath v. Lalji*, (1889) A. W. N., 198, followed.

FIRST APPEAL from an order of E. H. Ashworth Esq., District Judge of Saharanpur, modifying the decree of B. Murari Lal, Munsif.

Suit for partition of a house.

The facts material for the purposes of report appear from the judgment. The court of first instance decreed the suit. The lower appellate court modified the decree and remanded the suit for carrying out the partition.

Plaintiff's appealed.

*Abdul Raoof* (for whom *Ahmad Karim*), for the appellants.

*Satish Chandra Banerji* (for whom *Kedar Nath*), for the respondents.

The judgment of the Court was delivered by

AIKMAN, J.—The plaintiffs, who are appellants here, sued for the partition of a house in which they claimed a half share. The Munsif decreed the suit and allotted half of the house to the plaintiffs. The defendants appealed, contending amongst other things, that the plaintiffs were only entitled to a one-fourth share in the property. The District Judge decided this plea in the defendant's favour, holding that all that the plaintiffs were entitled to was a one-fourth share. He then passed an order, purporting to be under section 562

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1908.

January, 21.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

Aikman, J.

\* F. A. F. O. No. 16 of 1907.

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of the Code of Civil Procedure, remanding the case to the first court, not, as that section indicates, in order that the suit might be determined on the merits, but that the partition might be carried through on the finding arrived at by the appellate court as to the rights of the parties. The plaintiffs have preferred an appeal from this decree on a two rupee stamp, treating it as an appeal from an order. In the memorandum of appeal filed in this court, no plea is raised to the effect that the case ought not to have been remanded. The pleas put forward go to the merits of the case and attack the decision of the lower court in regard to the plaintiffs' rights. For the respondents, a preliminary objection is taken on the ground that the plaintiffs ought to have appealed from the decision of the court below as from a decree, and that they should not be allowed to appeal on a memorandum of appeal bearing only a two rupee stamp. In our opinion, this objection is well-founded. The plaintiffs ought to have appealed from the decision of the court below as from a decree. Following the course adopted in the case of *Kedar Nath v. Lalji Sahai* (1), we dismiss the appeal, making no order as to costs and leaving it to the appellants to take such steps as may be available to them for filing a duly framed appeal.

*Appeal allowed.*

(1) [1889], A. W. N., 198.

## WILAYATI BEGAM

*versus*

## NAND KISHORE.\*

CIVIL.

1908.

March, 12.

STANLEY, C. J.  
BURKITT, J.

*Code of Civil Procedure (Act XIV of 1882), section 244—Dispute between decree-holder and purchaser of a share in joint property belonging to judgment-debtor and decree-holder.*

W obtained a decree for possession of her share in joint property against A. Before execution R attached and sold that property as A's and N purchased it. W was afterwards put in formal possession of her share. W's application for mutation of names was refused. She brought the present suit. *Held*, that in view of the fact that the property was undivided revenue paying property W was only entitled to be put in formal possession. As soon as she was put in formal possession she obtained all that she was entitled to under the decree and when the defendant resisted her, she was entitled to bring a suit. *Gulzari Lal v. Mudho Ram*, I. L. R., 26 All., 447, distinguished. *Held*, further that it was not necessary to bring N upon the record on account of his purchase as he was a purchaser *pendente lite*.

APPEAL against the judgment of RICHARDS, J., confirming a decree of Sheikh Maula Baksh, reversing a decree of B. Chajju Mal, Munsif.

The material facts appear from the judgment.

*Abdul Majid*, for the appellant.

*G. W. Dillon*, for the respondent.

The judgment of the Court was delivered by

STANLEY, C. J.—The facts of this case are fully set out in the judgment of the learned Judge of this Court from whose decision this appeal has been preferred. They are not complicated. The plaintiff Musammat Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also *sir* land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December, 1896, got a decree for possession. This decree was not put into execution until the 6th of December,

*Stanley, C. J.*

\*L. P. A. No. 53 of 1207,

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*Stanley, C. J.*

1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam, was a share-holder, and at the auction sale the defendant Nand Kishore became the purchaser, on the 20th of August, 1895. In 1899, he got possession of the property so purchased. The plaintiff appellant applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon the suit, out of which this appeal has arisen, was instituted on the 25th of July, 1904.

The court of first instance decreed the plaintiff's claim, but this decree was reversed on appeal, and on second appeal to this Court, the learned Judge dismissed the appeals on the ground that the suit was barred by section 244 of the Code of Civil Procedure. He held that the case fell within the ruling in *Gulsari Lal v. Mudho Ram* <sup>(1)</sup>, that Nand Kishore was as the purchaser in that case, the representative of the judgment-debtor, within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that that question was only determinable by the court executing the decree.

Now, was the question raised one relating to the execution of the decree? This is the important question. There is an aspect of the facts which does not appear to have been present to the mind of the learned Judge, and no doubt was not brought to his notice in argument. Musammat Wilayati Begam was entitled only to an undivided share of the property of Nihali Begam, and could not in her former suit obtain more than a decree declaring her title to that share. She could not in that suit have got more than formal possession. She could not obtain physical possession, without instituting partition proceedings. The proceedings in execution in that suit, therefore, ended with the delivery of formal possession—*Jagan Nath v. Milap Chand* <sup>(2)</sup>. Wilayati Begam having got formal possession in execution thereby exhausted all the

(1) [1904] I L. R., 26 All., 447. (2) [1899] I. L. R., 21 All., 277

remedies open to her in that suit. Physical possession could only be obtained by partition in the Revenue Court. Now let us see what was the position of Nand Kishore. He purchased the property in dispute *pendente lite*, that is, during the pendency of the suit of Wilayati Begam, and therefore became bound by the judgment which was obtained by the plaintiff against Ali Sher Khan and others. An alienation or assignment *pendente lite* is not permitted to affect the rights of other parties to a suit unless it disables the party who makes the alienation from carrying out the order of the court, in which case the alienee or assignee must be brought before the court. In the present case all that the plaintiff was entitled to was a declaration of her title to her share in the estate of Nihali Begam, and there was no necessity to bring Nand Kishore, the purchaser *pendente lite*, before the court. It was argued before us on behalf of the respondent that the plaintiff ought to have applied to have Nand Kishore added as a party and to have obtained a decree against him. But it appears to us that it was not obligatory on the plaintiff to make any application. If she had made it, it would have rested in the discretion of the court to grant or refuse the application. Now a grantee *pendente lite* cannot question the decree or any proceeding in the cause which from the nature of the suit and the relief prayed for might naturally result. The practice under the Judicature Act in England is similar in this respect to that prevailing in this country under the Civil Procedure Code, and in England the addition to the array of parties of a purchaser *pendente lite* is ordinarily not regarded as necessary—*Kino v. Rudkin* <sup>(3)</sup>, also (Daniel's Chancery Practice, 6th edn., p. 256). In view then of the fact that the plaintiff appellant in her former suit obtained all the relief to which she was entitled as a co-sharer in an undivided estate, and that she obtained formal possession of her share in execution of the decree passed in that suit, we do not think that the ruling in the case of *Gulzari Lal v. Madho Ram*, bars her right to maintain the present suit. When the defendant resisted her claim to have her name recorded as owner in respect of her share, she was, we think, justified in instituting the suit out of which this appeal has

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(3) [1877] L. R., 6 Ch. D., 160. at p. 162.

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arisen, which is one in substance for the declaration of her title to a share as against the defendant, who in the mutation proceedings denied her title, thereby throwing a cloud on it. She cannot obtain proprietary possession of the share unless she takes partition proceedings, and in so far as the court of first instance granted her a decree for proprietary possession, that decree cannot be upheld. We allow the appeal, set aside the decree of the learned Judge of this Court, and also the decree in the lower appellate court and decree the plaintiff's claim for a declaration of her title as claimed with costs in all courts.

*Appeal decreed.*

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1908.

*March, 6.*STANLEY, C. J.  
BURKITT, J.

KHUMAN SINGH AND OTHERS

*versus*

MAKHAN SINGH AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882), section 244—Reversioners of a Hindu—Decree against the widow—whether representatives of judgment-debtor.*

A decree for sale upon a mortgage of the husband's property was passed against a Hindu widow. She died before execution, and the decree-holders applied to bring the reversioners of the husband on the record. The reversioners objected on the ground that they were not the representatives of the widow. *Held*, that it is the duty of the court to stay execution until the question so raised is decided by a separate suit or to itself determine the question. If it decides that they are not the representatives of the judgment-debtor, it should reject the application.

APPEAL against the judgment of Dillon, J., reversing a decree of Pandit Pitambar Joshi, Additional Subordinate Judge of Aligarh, confirming a decree of B. Jagat Narain, Munsif.

Application for execution of decree.

The material facts appear from the judgment. The courts below rejected the application. Dillon, J. allowed the appeal.

Judgment-debtors appealed.

\* L. P. A. No. 65 of 1907

*Gulzari Lal*, (with him *Satish Chandra Banerji*), for the appellants.

*Situl Prasad Ghosh*, for the respondents.

The judgment of the Court was delivered by

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STANLEY, C. J.,—We are wholly unable to agree with the learned Judge from whose decision this appeal has been preferred, in the view which he took of the law. That view is based upon the ruling in the case of *Liladhar v. Chattarbhuji* (1). But it appears to us that an important feature of that escaped the notice of the learned Judge. The facts are these. Musammat Dan Kunwar, the widow of one Kishori Singh, mortgaged property of her husband in which she had a life-estate, to the predecessors in title of the decree-holders respondents. A suit was brought upon this mortgage and a decree for sale of the mortgaged property was passed, and an order was subsequently passed under section 89 of the Transfer of Property Act. The widow died before execution of the decree. The plaintiffs respondents made an application in execution and asked that the appellants, the reversionary heirs of Kishori Singh, should be brought upon the record as representing his widow Musammat Dan Kunwar. They objected to be brought upon the record, setting up their title as reversionary heirs of Kishori Singh, and objecting to be made parties as the legal representatives of Musammat Dan Kunwar, which they were not.

The court of first instance did not take any notice of this objection, but dismissed the application for execution upon other grounds. Upon appeal, the learned Additional Subordinate Judge confirmed the order of the court of first instance on the ground that the appellants before us were not legal representatives of Musammat Dan Kunwar. A second appeal was preferred, and the learned Judge before whom it came, being of opinion that the case was governed by the ruling in *Liladhar v. Chattarbhuji*, reversed the decision of the courts below and passed an order for the execution of the decree. Against this decision the appeal before us has been preferred.

(1) [1899] I. L. R., 21 All., 277.



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It appears to us that so soon as the appellants raised the objection that they were not the legal representatives of Musammat Dan Kunwar, it was the duty of the court, under section 244 of the Code of Civil Procedure to stay execution of the decree until the question so raised had been determined by a separate suit, or else itself determine the question. The lower appellate court determined the question and found that the appellants are not the legal representatives of Musammat Dan Kunwar. This being so, it is obvious that the decree passed against Musammat Dan Kunwar cannot be executed as against them or against their property. The case upon which the learned Judge relies appears to us not to be applicable, and for this reason, namely, that in that case the persons who were made parties to the execution proceedings, as legal representatives of the deceased mortgagor, did not repudiate their alleged representative character, but set up other objections to the execution of the decree. The Court rightly, we think, held that the persons who were the legal representatives of a deceased mortgagor cannot be heard to question the decree which was passed against the person whom they represent. In this case the appellants repudiated the notion of their being legal representatives of the mortgagor from the outset and established to the satisfaction of the lower appellate court that they were not such representatives. We therefore allow the appeal, set aside the decree of the learned Judge of this Court and pass a decree rejecting the application for execution so far as regards the appellants. The appellants will have their costs in all courts.

*Appeal decreed.*

C. E. GREY  
versus  
HAZARI LAL.\*

*Code of Civil Procedure (Act XIV of 1882), section 244—Application for payment of sale proceeds to official assignee—Not an application in execution—Appeal.*

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—  
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An official assignee is not a representative of the judgment-debtor within the meaning of section 244, Civil Procedure Code. An application for payment of money to him of the proceeds of sale is not an application for execution, discharge or satisfaction of the decree, and no appeal lies against an order rejecting that application. *Kashi Prasad v. Miller*, 1. L. R., 7 All., 752, followed.

APPEAL against the order of Babu Girdhari Lal, Subordinate Judge of Cawnpore.

Application to have the proceeds of sale paid over to the applicant.

The court below dismissed the application.

Applicant appealed.

The facts material for the purposes of the report appear from the judgment.

*Moti Lal Nehru*, for the respondent, raised a preliminary objection to the hearing of the appeal.

*Satya Chandra Mukerji* (with him *Gulzari Lal*), for the appellant.

The judgment of the Court was delivered by

AIKMAN, J.—The respondent decree-holder obtained a decree against Dhani Ram and his son, Lachmi Narain on the 2nd of May, 1907. In execution of his decree, property belonging to the judgment-debtors was sold on the 27th and the 28th May, 1907. The judgment-debtors were declared insolvents by the Calcutta High Court and vesting orders, in respect of their property, were passed in the case of Dhani Ram on the 17th May, 1907, and in the case of Lachmi Narain on the 29th May, 1907. The insolvents' schedules were not

*Aikman, J.*

\* E. F. A. No. 257 of 1907.

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filed until the 7th April, 1908. The appellant, who is the Official Assignee, applied to the court below for payment to him of the proceeds of the sale. The court below relying on the ruling of this Court in *Kashi Prasad v. Miller* <sup>(1)</sup>, refused the application.

The Official Assignee comes here in appeal. An objection is taken that no appeal lies, on the ground that he is not the representative of the judgment-debtors within the meaning of section 244 of the Code of Civil Procedure, and that this application does not relate to the execution, discharge or satisfaction of the decree and consequently no appeal lies.

The decision cited above is clearly in favour of this objection. That decision has never been overruled by this Court, and has been followed in the case of *Sardar Mal v. Moodliar and C. Agnew Turner, Official Assignee* <sup>(2)</sup>, and *Chandmull v. Ranee Soondery Dossee* <sup>(3)</sup>. With reference to these authorities, we must sustain the objection and hold that no appeal lies. The result is we dismiss this appeal with costs.

*Appeal dismissed.*

(1) [1885] I. L. R., 7 All., 752. (2) [1897] I. L. R., 21 Bom., 205.

(3) [1895] I. L. R., 22 Cal., 259.

## HAZARI MAL

*versus*

BHAWANI RAM AND OTHERS.\*

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June, 29.

AIKMAN, J.  
GRIFFIN, J.

*Non-joinder, objection as to—Objection to be taken at the earliest opportunity—Code of Civil Procedure (Act XIV of 1882), section 34—Limitation.*

Where a defendant does not take any objection as to non-joinder of necessary parties in his written statement but does so upwards of six months afterwards, and the plaintiff thereupon makes an application for the names to be added which is done after the period of limitation for the suit had expired, *held*, that the suit is not barred by limitation as the defendant's objection as to non-joinder not having been made at the earliest opportunity ought to have been disregarded with reference to section 34, Code of Civil Procedure.

\* F. A. F. O. No. 190 of 1908.

APPEAL against the order of Munshi Muhammad Ahmad Ali Khan, Additional Judge of Meerut, reversing a decree of B. Gobind Prasad, Additional Munsif of Ghaziabad.

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1908.

HAZARI MAL

v.

BHAWANI RAM.

Suit to recover a sum of money.

The facts material for the purposes of the report appear from the judgment.

*Surendra Nath Sen*, for the appellant.

*Durga Charan Banerji*, for the respondents.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal from an order of remand. The plaintiffs Bhawani Ram and Jawahir Lal brought the suit on the allegation that they with one Rekhal Das were proprietors of a banking and commission firm at Sikundrabad, and that Hazari Mal, the principal defendant, was indebted to the firm. Rekhal Das did not join in the suit, and was made a *pro formâ* defendant. The suit was filed on the 16th of August, 1906. The defendant Hazari Mal filed a written statement on the 5th of September, 1906. In that he took no objection to want of parties. Upwards of six months afterwards, namely, on the 20th of March, 1907, he took objection to the effect that the two minor sons of Rekhal Das ought to have been joined as parties to the suit and that in their absence the suit could not proceed. Thereon the plaintiffs in order to remove this objection, though not admitting that the minors were necessary parties, applied for their names to be added, and this was done. Objection was then taken that the suit could not be maintained as it was barred against the added defendants at the time their names were brought upon the record. The court of first instance relying on the decision in *Samrathi Singh v. Kishan Prasad* (1), held that the minors were necessary parties, and as they were not joined as *pro formâ* defendants until after the period of limitation for the suit, it could not be maintained. Accordingly he dismissed the suit. On appeal the Additional District Judge after referring to certain rulings allowed the appeal, and sent back the case for decision on the merits. The principal defendant Hazari Mal appeals from that order of remand. In our opinion, this case is distinguishable

*Aikman, J.*

(1) [1907] I. L. R., 29 All., 311.

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from that relied on by the learned Munsif. The facts resemble more those of a case referred to in the ruling, *Samrathi Singh v. Kishan Prasad*, namely, the case of *Pateshri Pratap Narain Singh v. Rudra Prasad Narain Singh*<sup>(2)</sup>. In this case the objection to want of parties was clearly not taken at the earliest possible opportunity. The defendant belongs to the same caste and resides in the same place as the plaintiffs, and must be deemed to have known of the existence of the sons of Rekhal Das. Had he taken objections in his written statement, the case would have been different, but then had he done so, the plaintiff could at once, within the period of limitation, have added the names of the minors. The defendant waited until a suit with the minors as defendants was barred by limitation and then took objection. In the case, *Pateshri Pratap Narain Singh v. Rudra Pratap Narain Singh*, the learned Judges cited with approval a passage from a judgment of the Bombay High Court in the case *Guruvayya Gouda v. Dattatraya Anant*<sup>(3)</sup>, where it is said :—"We must hold that the bar of limitation was not established as the defendant's objection to non-joinder of parties having been taken at a late stage of the suit may be disregarded." We think that the court of first instance ought not to have entertained the objection having regard to the provisions of section 34 of the Code of Civil Procedure. On the grounds stated above we uphold the decision of the court below, and dismiss this appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

(2) [1904] I. L. R., 26 All., 528.

(3) [1903] I. L. R., 28 Bom., 11.

## ANANDI KUNWARI

versus

## AJUDHIA NATH.\*

*Code of Civil Procedure (Act XIV of 1882), sections 244, 310A—Dispute between judgment-debtor and auction purchaser—Appeal—Auction purchaser, a representative of judgment-debtor.*

An auction purchaser is a representative of the judgment-debtor and not that of the decree-holder whose interest in the case closes as soon as he gets his money. Any dispute between a judgment-debtor and the auction purchaser is not a dispute between parties to the suit or their representatives and does not fall within the purview of section 244 of the Civil Procedure Code.

No appeal lies against an order passed under section 310A of the Code of Civil Procedure, but the order is capable of being revised.

A dispute between the judgment-debtor and his representative does not fall within section 244.

*Manickha v. Rajagopala*, I. L. R., 30 Mad., 507; *Imtiaz Begam v. Dhumam Begam*, I. L. R., 29 All., 275, dissented from; *Bashir-ud-din v. Jhori Singh*, I. L. R., 19 All., 140, followed; *Kuber Singh v. Sahib Lal*, I. L. R., 27 All., 263; *Gulzari Lal v. Madho Ram*, I. L. R., 26 All., 447; *Magan Lal v. Doshi*, I. L. R., 25 Bom., 631; *Raynor v. The Mussoorie Bank*, I. L. R., 7 All., 681, referred to.

APPLICATION to revise an order of F. D. Simpson, Esq., District Judge of Gorakhpur, reversing an order of Babu Lal Gopal Mukerji, Munsif.

Application to set aside a sale under section 310 A, Civil Procedure Code.

The court of first instance set aside the sale but the lower appellate court reversed the order.

The facts appear from the judgment.

*Tej Bahadur Sapru* (with him *Sundar Lal*, *Moti Lal Nehru*, *Madan Mohan Malaviya* and *Braj Narain Gurtu*), for the petitioner.

*J. N. Chaudri*, for the respondent.

The judgment of the Court was delivered by

GRIFFIN, J.—This is an application for revision of an order of the learned District Judge of Gorakhpur, allowing

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May, 18.

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GRIFFIN, J.

Griffin, J

\* Civil Revision No. 75 of 1907.

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the appeal of an auction purchaser against the order of the Munsif setting aside a sale under section 310A of the Code of Civil Procedure. The facts out of which this application has arisen are that one Magan Sahu obtained an *ex parte* decree against the applicant on the 17th of September, 1903. In execution of that decree, a house was advertised for sale on the 13th of December, 1906. On the 11th of December, 1906, the judgment-debtor, Musammat Anandi Kunwari, applied to the court under section 108 of the Code of Civil Procedure, to have the *ex parte* decree set aside. That application was entertained, and the 2nd of February, 1907, was fixed for hearing. On the 12th of December the applicant deposited in court Rs. 99 in part payment of the decretal amount and asked that the sale be postponed for one week, promising at the same time to deposit the balance of the decretal amount within the week. The sale was postponed to the 20th of December. On that date, the applicant not having paid in the balance, the house was sold and purchased by the opposite party, Ajudhia Nath Ojha, for a sum of Rs. 220. The house is said to be a very valuable one, and from the array of counsel engaged on behalf of the applicant in this Court, this would seem to be the case. On the 16th of January, 1907, the applicant deposited in court Rs. 205 together with a sum sufficient to cover the 5 per cent on the purchase money, allowed by the provisions of section 310A. This sum with the deposit previously made by her was sufficient to satisfy the amount due under the decree. She asked that the sale be set aside under section 310A. She added a prayer that the sum be held in deposit pending the disposal of her application to have the *ex parte* decree set aside. On the 2nd of February, 1907, her application under section 108 was dismissed. The court of first instance held that under the circumstances there had been a sufficient compliance with the provisions of section 310A, and made an order setting aside the sale. Against that order the auction purchaser preferred an appeal to the learned District Judge, who entertained it, and in the result set aside the Munsif's order on the ground that the deposit by the judgment-debtor was not an unconditional one. The judgment-debtor has applied to this Court for revision of the appellate order of the learned District Judge on the ground

that no appeal lay to him from the Munsif's order. In support of the application reliance is placed on the rulings in *Bashir-ud-din v. Jhori Singh*<sup>(1)</sup>, and *Kuber Singh v. Shib Lal*<sup>(2)</sup>. These rulings support the applicant's contention that no appeal is allowed by law against an order under section 310A. On behalf of the opposite party reliance is placed on the ruling in *Imtiaz Begam v. Dhuman Begam* <sup>(3)</sup>, in which a Bench of this Court declined to follow the case reported in I. L. R., 19 All., 140, above referred to, on the ground that the auction purchaser is the representative of the judgment-debtor and that therefore an appeal lay under the provisions of section 244(c) of the Code of Civil Procedure. The ruling in 29 Allahabad contains no reference to the decision of this Court reported in I. L. R., 27 All., 263. It appears to us that the learned Judges, whilst holding that the auction purchaser is a representative of the judgment-debtor, omitted to notice that the contest was between the auction purchaser and the judgment-debtor. They held that the case fell within the provisions of section 244(c), on the authority of the Full Bench decision of this Court in *Gulsari Lal v. Madho Ram* <sup>(4)</sup>. In that case, the contest was between the holder of a mortgage decree and an auction purchaser at a sale held in execution of a simple money decree against a judgment-debtor whose property was ordered to be sold in the suit of the mortgagee. This, it seems to us, is entirely a different case and clearly falls under section 244(c). We agree with the ruling in *Bashir-ud-din v. Jhori Singh*, referred to above. No appeal is allowed by section 588 of the Code of Civil Procedure from an order under section 310A of that Code. The case in our opinion does not come within section 244 of the Code. It was simply a question between the judgment-debtor and a purchaser at an auction sale. It was immaterial to the decree-holder whether he received his money from a deposit made by the judgment-debtor or from the price paid by a purchaser at an auction sale. The learned advocate for the opposite party strenuously contended that, even when the dispute is between the auction purchaser as representative of the judgment-debtor, and the judgment-debtor the case still

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(1) [1896] I. L. R., 19 All., 140. (2) [1904] I. L. R., 27 All., 263

(3) [1907] I. L. R., 29 All., 275. (4) [1901] I. L. R., 26 All., 447.



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falls under section 244(c) of the Code of Civil Procedure. Amongst the questions to be determined under section 244 are "questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." Admitting that in the present case there is a question relating to the execution of a decree, can it be said that it is a question arising between the parties to the suit or their representatives? In our opinion, it cannot. The same view was taken by the Bombay High Court in *Magan Lal Mulji v. Doshi Mulji* <sup>(5)</sup>, in which the learned Chief Justice said :—"Now here the question is simply between the judgment-debtor and the purchaser of his interest in the land, and can it be said that the auction purchaser is the representative of a party? Certainly not of the decree-holder; therefore he can only claim to be a representative of the judgment-debtor. I doubt whether he can claim this character. But assuming for the sake of argument he can, it would not aid him; for in our opinion, the section does not cover a question between a party to the suit and his representative. Therefore we have not the necessary basis for the application of section 244, and as a consequence we hold no appeal lies, because it is only so far as an order under section 310A comes under section 244(c) that it is appealable." We are in agreement with the concluding portion of the above passage. In this view, we are supported by what was said in the case of *Raynor v. The Mussoorie Bank* <sup>(6)</sup>. At page 686 of the judgment the learned Judges remark:—"But, apart from other considerations showing that section 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application between the parties, that is to say, between the parties arrayed against each other as decree-holders of the one part, and the judgment-debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgment-debtors *inter se*, and the provisions of section 244 do not apply to the determination of such questions." So here, the controversy is between a judgment-debtor and his representative, and we think it would be straining the language

(5) [1901] I. L. R., 25 Bom., 631. (6) [1885] I. L. R., 7 All., 681.

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of section 244 to hold that such a dispute falls within the scope of that section. The learned advocate for the opposite party further contended that in this case the auction purchaser was a representative of the decree-holder, and in support of this view, he relies upon the ruling of the Madras High Court in *Manickka Odayan v. Rajagopala Pillai* <sup>(7)</sup>. That ruling supports the learned advocate's contention; but with all deference to the learned Judges who decided that case, we find ourselves unable to follow them. We are unable to hold that in a case like the present the auction purchaser can be deemed in any way to represent the decree-holder, whose interest in the case closed as soon as he got the money. No appeal is given by section 588 of the Code of Civil Procedure, and for the reasons given above, we hold that the case does not fall within the provisions of section 244 of the Code, so as to give a right of appeal under that section. The result is that in our opinion, the District Judge had no jurisdiction to hear the appeal, and we think his order should be set aside. But as under section 622 of the Code, we are empowered in a case like this to pass such order as we think fit, we consider it right to make the order setting aside the decree of the lower appellate court, conditional upon the applicant paying into court for the opposite party, in addition to the sum already paid, interest on the purchase money (Rs. 220) at the rate of 5 per cent per annum from 17th January, 1907, up to this date. On this additional amount being paid in within one month of the date of this order being certified to the court below, the decree of the learned District Judge will stand discharged and that of the court of first instance restored. But if the sum be not paid within the time allowed, this application will stand dismissed. We make no order as to costs.

*Application granted.*

(7) [1907] I. L. R., 30 Mad., 507.

CRIMINAL.

1908.

February, 18.

KNOX, J.

MIHI LAL

versus

LARETI PRASAD.\*

*Criminal Procedure Code (Act V of 1898), sections 195, 476—Sanction refused by a Magistrate of first class—Power of District Magistrate.*

A District Magistrate has no jurisdiction to entertain an application, for sanction to prosecute a complainant, refused by a Magistrate of the first class who tried the case and from whose order appeals ordinarily do not lie to the District Magistrate. If he entertains such an application, his order is *ultra vires*. *Held*, further that he has no power to entertain such an application under section 476 of the Code of Criminal Procedure as the offence was not committed before him.

CRIMINAL REFERENCE made by the Additional Sessions Judge of Aligarh.

The circumstances under which the reference was made appear from the judgment.

The Assistant Government Advocate (*W. K. Porter*), in support of the order of the District Magistrate.

The following judgment was delivered by

Knox, J.

KNOX, J.—The circumstances of this case are rather peculiar. One Mihi Lal filed a complaint against Lareti Prasad, charging him with offences under sections 218 and 463 of the Indian Penal Code. The Magistrate before whom the case was instituted discharged the accused and awarded him Rs. 15 compensation under the provisions of section 250 of the Code of Criminal Procedure. Lareti Prasad then applied to the same Magistrate for sanction to prosecute the applicant under section 193 of the Indian Penal Code, alleging that the evidence given by him, Mihi Lal, in the case was false. Sanction was refused, and Lareti Prasad then applied to the Court of the District Magistrate for the grant of sanction which had been refused by the Subordinate Magistrate, who is a Magistrate exercising powers of a Magistrate of the first class.

\* Cr. Ref. No. 56 of 1908.

The District Magistrate had no jurisdiction to entertain this application, as his court was not one to which appeals from the Court of the Subordinate Magistrate in question ordinarily lay. Whether the learned Magistrate took this matter into consideration or not does not appear from his judgment. He, without setting aside the order of the Subordinate Magistrate, directed the prosecution of Mihi Lal under section 211 of the Indian Penal Code. As the learned District Magistrate could not pass any orders under section 195 of the Code of Criminal Procedure, the only other section under which, so far as I know, he could have taken action is section 435 of the Code of Criminal Procedure. Assuming for the moment that he did act under that section, the order that he passed is, in my opinion, illegal. The powers given to a District Magistrate under section 435 and the following sections do not anywhere include the power conferred on a court of appeal by section 195. All that he could have done was to make a report for the orders of this Court, showing the result of his examination of the record. This he did not do. It may be argued that the learned District Magistrate took action under section 476 of the Code of Criminal Procedure. If he did so, his action and his order, in my opinion, are *ultra vires*. The offence, in respect of which he gave sanction, *viz.*, an offence under section 211 of the Indian Penal Code, was not committed before him or brought under his notice in the course of a judicial proceeding. As I have already stated, his action under section 435 of the Code is confined merely to an examination of the record and to report to this Court. Section 435 confers no powers upon a District Magistrate under it to take evidence. The only case in which he can take evidence is set out in section 437. It is evident from the order which he made upon the application that the case before him was one which called for no action under section 437 of the Code. In any case then the order of the District Magistrate was *ultra vires*, and the case has been properly reported by the learned Additional Sessions Judge. I set aside the order of the District Magistrate, dated the 9th of November, 1907, and direct that the record be returned.

*Order set aside.*

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1908.

March, 3,

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

## NIHAL CHAND

*versus*

RUSTAM ALI KHAN AND ANOTHER.\*

*Civil and Revenue Court—Jurisdiction—Suit for declaration that lease void.*

A suit by co-sharers of a village that a lease granted by a lambardar was null and void is a suit of which the Civil Courts can take cognisance. *Jagannath v. Hardayal*, A. W. N., 1897, p. 207, referred to.

APPEAL against the order of Austin Kendall Esq., Additional Judge of Meerut, reversing a decree of Babu Ram Das, Munsif.

Suit for a declaration that the counter-part of a lease is void and for possession.

The facts appear from the judgment.

The court of first instance dismissed the suit but the lower appellate court reversed the decree.

Defendant appealed.

*Baldev Ram Dave* (for *Sundar Lal*, and with him *Gokul Prasad*), for the appellant.

*Jagbandhu Phani*, (for *Satish Chandra Banerji*), for the respondents.

The judgment of the Court was delivered by

Aikman, J.

AIKMAN, J.—The plaintiffs, who are respondents here, came into court alleging that one of the defendants to the suit, namely, Nawab Muhammad Hashmat Ali Khan, together with certain other defendants, and the plaintiffs themselves are owners of certain land set out in the plaint; that the defendant above-mentioned is the lambardar, and that he in order to cause loss to the plaintiffs, had, without the plaintiffs' consent, granted to the defendant Rai Bahadur Lala Nihal Chand a perpetual lease of the land and taken a counter-part from him under which the last named defendant was in possession. They accordingly prayed for a declaration that the counter-part of the lease is null and void, and they further

\* F. A. F. O. No. 41 of 1907.

asked that they should be put in proprietary possession of the land. The suit was dismissed by the court of first instance which held that the case was one in which the plaintiffs could get no relief in a Civil Court. The plaintiffs appealed. The learned Additional Judge allowed the appeal, set aside the decree of the court of first instance and remanded the case for decision on the merits. The defendant lessee appeals against this order of remand. In our opinion, the order of the learned Additional Judge is not open to the objections taken. We consider that the plaintiffs could not have got the reliefs they ask for by a suit in a Revenue Court. Suits similar to the present have been hitherto entertained by the Civil Court. See, for instance, the case of *Jagannath v. Har Dayal* <sup>(1)</sup>. No doubt, until the lease is set aside the appellant is a tenant, but in this suit the respondents challenge the validity of the lease, and we are of opinion that it is for the Civil Court to decide, as it has decided in numerous similar cases, whether under the circumstances of the case the granting of the lease was or was not within the authority of the lambardar. We dismiss the appeal with costs.

Objections have been taken under section 561 of the Code of Civil Procedure. In our opinion, there is no force in them. The objections are likewise dismissed. We may observe that in our opinion the claim of the plaintiffs to be put in proprietary possession of the land on cancellation of the lease is one which cannot be maintained.

*Appeal dismissed*

(1) [1897], A. W. N., p. 207.

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NIHAL CHAND

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March, 31.

AIKMAN, J.

MOHIBULLAH

versus

ABDUL KHALIK AND OTHERS.\*

*Mahomedan Law—mushaa of undivided property—possession of half.*

G made a gift of his property to his two daughters and delivered possession of a half undivided share to one of them, the other being absent on a pilgrimage. *Held*, that the gift was not invalid but passed the interest in the property to the daughters. *Muhammad Muntaz Ahmad v. Zubaidajan*, I. L. R., 11 All., 460, referred to.

SECOND APPEAL against the decree of Babu Udit Narain Singh, Officiating Subordinate Judge of Allahabad, reversing a decree of Pandit Mohan Lal Hukku, Munsif.

Application for execution of a decree.

The court of first instance dismissed the application but the lower appellate court reversed the decree.

Judgment-debtor appealed.

*Ghulam Muftaba*, for the appellant.

*Durga Charan Banerji* (with him *Abdul Majid*), for the respondents.

The following judgment was delivered by

Aikman, J.

AIKMAN, J.—The respondents attached a house as belonging to their judgment-debtor, Wali Muhammad, against whom they had obtained a decree. The house had belonged to Ghazi, the father of Wali Muhammad. It is proved that Ghazi by a deed of gift, executed on the 6th of April, 1906, gave the house in equal shares to his daughters-in-law, Musammat Haliman and Musammat Ayasha, Ayasha is dead and the appellant Mohibullah is her son and heir. Musammat Haliman and Mohibullah objected to the attachment. Haliman's objection as to her half was overruled by the Munsif on the ground that at the time of the gift she was on a pilgrimage to Mecca and so did not get possession of the property. The learned Munsif found that Ayasha had got possession of her half share and sustained the objection of

\* E. S. A. 982 of 1907.

Mohibullah. On appeal by the decree-holders, the learned Subordinate Judge found that the gift in favour of Ayasha was invalid according to Mahomedan Law and overruled Mohibullah's objection. Mohibullah comes here in second appeal. The learned Subordinate Judge does not dissent from the finding that Ayasha got possession of her half, but he says that "the delivery of possession to Musammatt Ayasha of the one moiety gifted away to her did not confer any right on her." The learned Vakil for the appellant relies on what was said by their Lordships of the Privy Council in the case, *Muhammad Mumtaz Ahmad v. Zubaida Jan* <sup>(1)</sup> at pages 474 and 475 of their judgment. Their Lordships, referring to the authorities cited by Syed Ameer Ali in his Tagore Lectures of 1884, say "The authorities show that possession taken under an invalid gift of *mushaa* transfers the property according to the doctrines of both Shia and Sunni schools." They add, "the doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules." At page 42, vol 1 of Ameer Ali's Mahomedan Law, 3rd edition, the author remarks "A *hiba-bil-mushaa* or gift of an undivided joint property is not void, but only invalid, and possession remedies the defect." He goes on to cite various authorities in support of this view. The learned Advocate for the respondents refers to the cases cited on page 434 of Macnaghten's Principles of Mahomedan Law, and also to the opinion expressed by that author in paragraph 6, chapter 5, page 50. It is not easy to reconcile all the authorities, but having regard to the findings of the courts below that Ayasha did get possession of her half and to the passage cited from the judgment of the Privy Council. I am of opinion that the appeal must succeed. I accordingly set aside the order of the court below, and restore the order of the court of first instance. The appellant will have his costs here and in the courts below.

*Appeal decreed.*

(1) [1889] I. L. R., 11 All., 460.

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1908.

August, 4.

STANLEY, C. J.  
BANERJI, J.

DHARAM KUNWAR

versus

BALWANT SINGH.\*

*Estoppel—Representation by a widow that she was competent to adopt—Evidence Act (I of 1872), section 115—Adoption—Adopted son borrowing money and incurring other expenses on faith of representation—Subsequent denial of authority to adopt.*

Where a widow represented that she had authority to adopt and the ceremony of adoption was carried out on the faith of this representation, the marriage of the adopted son was celebrated by the adoptive mother; the adoption was challenged by a reversioner and the adopted son in order to defend his right incurred heavy liabilities, *held* that the adoptive mother was estopped from maintaining a suit for a declaration that she had no authority to adopt. *Kannumal v. Virasami*, I. L. R., 15 Mad., 486; *Rangi Vinyak v. Lakshmi Bai*, I. L. R., 11 Bom., 381; *Sant Appayya v. Ramgoppaya*, I. L. R., Mad., 397; *Thakoor Oomrao Singh v. Thakooranee Mehtab Kunwar*, [1868] N. W. P., H. C. R., 103; *Durga v. Khushali*, [1882] A. W. N., 97; *Sukhbasi Lal v. Guman Singh*, I. L. R., 2 All., 366 *Sarat Chandar v. Gopal Chandar* I. L. R., 20 Cal., 296 at 311; referred to.

FIRST APPEAL against the decree of Babu Nehala Chandra Subordinate Judge of Sahranpur.

The material facts appear from the judgment. The court below dismissed the suit.

Plaintiff appealed.

*Sundarlal*, (with him *J. N. Chandri*, *Nehal Chand* and *Ahmad Karim*), for the appellant.

*Motilal Nehru* (with him *S. C. Banerji*, *Gulzarilal* and *Surendra Nath Sen*), for the respondent.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—The title to the Landhaura Estate, an extensive and valuable estate, situate in the district of Saharanpur and other districts is involved in this appeal. The plaintiff, who is the widow of the late Raja Raghubir Singh seeks for a declaration that she had no power to adopt the defendant Balwant Singh and that she in fact never adopted him, and that a document which is called a deed of adoption, dated the 13th of

\* F. A. 98 of 1906.

January, 1899, might be declared to be void. Raja Raghubir Singh died on the 23rd of April, 1868, at the age of about 20 years. After his death his widow the plaintiff Rani Dharam Kunwar gave birth to a son on the 16th of December, 1868, who was named Jagat Parkash Singh. This son died on the 31st of August, 1870, and on the 4th of March, 1877, the plaintiff adopted a boy Tohfa Singh who was afterwards renamed Raja Narendra Singh. This adopted boy died about 2½ years after his adoption, and on the 20th of January, 1883, the plaintiff adopted another boy named Ram Sarup who was renamed Ram Padab, Singh. In June, 1885, Ram Padab Singh died and a few years afterwards, the plaintiff took a boy named Umrao Singh to live with her with a view to his adoption. This boy also died, before adoption in May, 1896. Then on the 2nd of June, 1896, she determined to adopt another son and amongst others two sons of Ram Newaz, namely, the defendant Balwant Singh and his brother Tungal Singh, were brought to her for approval and these two boys were permitted to live with her for some time. Ram Newaz is a man in humble circumstances owning only a small zamindari on which Rs. 50 per annum is paid for revenue. The defendant, Balwant Singh, was selected, and on the 13th January, 1899, the ceremony of his adoption is alleged to have been performed with all due formalities and an agreement was executed by Ram Newaz as also by the plaintiff. It is this adoption which the plaintiff seeks to have declared invalid, her case being that she had no authority from her husband to adopt the defendant, and that the adoption in fact never took place.

The learned Subordinate Judge found that the *factum* of the adoption was proved, and that the plaintiff having adopted the defendant is estopped from alleging that she had no authority to make the adoption, and accordingly dismissed the plaintiff's suit. From this decision, the present appeal has been preferred.

On the 1st of May, 1900, one Baldeo Singh, claiming to be the reversionary heir of Raja Raghubir Singh, brought a suit to have the adoption of the defendant set aside and in that suit impleaded as defendants both Rani Dharam Kunwar and Balwant Singh. This suit was dismissed on the 30th of May, 1901, on the ground that the plaintiff was not the reversionary

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heir of Raja Raghubir Singh. The court in its judgment also held that Raja Raghubir Singh did not give any authority to his wife to adopt a son, and that therefore the adoption of Balwant Singh was invalid. An application was made to the Subordinate Judge by Rani Dharam Kunwar in which she prayed that the finding that she had no authority to adopt might be embodied in the decree so as to enable her to appeal from it and have it reversed. This application was granted. From the decree of the Subordinate Judge, Baldeo Singh appealed to the High Court. The appeal was heard before a Bench of which one of us was a member, and on the 10th of December, 1903, was dismissed. Four days after judgment was pronounced, an application was made to the Court on behalf of Balwant Singh under the following circumstances. When the learned Subordinate Judge delivered his judgment, his decree was that the plaintiff's claim be dismissed with costs but subsequently on an application made by Rani Dharam Kunwar he directed that his findings on three issues should be added to the decree. The findings on the second and third issues were to the effect that it had not been proved that Rani Dharam Kunwar had authority from her husband to make the adoption but that as a matter of fact she had adopted Balwant Singh. The application was that the findings on these issues should be struck out of the decree. The contention being that as the plaintiff Baldeo Singh had no *locus standi* to contest the adoption, it was unnecessary for the Subordinate Judge to have tried any other issue and that his findings on any other issues were mere *obiter dicta*, which should not have been added to the decree. This application was resisted by the defendant Rani Dharam Kunwar, and the court was frankly informed by the learned Advocate who appeared for her that her object in desiring to have the additions in question made to the decree was that they might be used by her as *res judicata* in future litigation between herself and Balwant Singh. The court acceded to the application and directed that the two findings to which we have referred should be struck out of the decree. The litigation which was then in contemplation is the suit out of which this appeal has arisen.

The learned Subordinate Judge did not determine, as we have said, whether Rani Dharam Kunwar had authority from

her husband to adopt. He dismissed the suit on the ground that she by her conduct was estopped from alleging that no such authority was given to her. Whether or not he was right in this decision is the main question in this appeal.

As to the *factum* of the adoption, there cannot be in our judgment any doubt whatever. The evidence shows that not merely was the adoption ceremony performed but it was performed with great pomp and ceremony. Invitations, to amongst others, the principal European inhabitants including the Collector, were issued and a large number attended. The proceedings lasted throughout the day and photographs of the scene were taken which have been produced. The fact of the adoption was indeed not seriously contested by the plaintiff's learned Advocate. Not merely is it established by the oral evidence which is voluminous but by two documents one bearing the seal of the plaintiff herself and the other signed by Ram Newaz, the father of the defendant. Those documents were registered on the 19th of January, 1899, the execution of the one which bears the seal of the plaintiff being then admitted by her. In this last mentioned document there is a recital that Raja Raghubir Singh entertained during his life-time the wish that a son might be born to him who would fulfil the religious needs and become the owner of his estates; that he had no male or female issue in his life-time, and that as the plaintiff was then pregnant he gave the following direction to her: 'If (God forbid) you give birth to a daughter or if a son be born but die after his birth, I strictly order you to adopt some boy so that he may perform my *sraddh* ceremony and yours and perpetuate my name; and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who may be adopted under this authority should die in your life-time, you will have power to make another adoption". Then there is a recital of the birth and death of her son, Raja Jagat Parkash Singh, and that in compliance with the will of her husband, the plaintiff had adopted a boy called Sewa Singh and Ram Padab, both of whom died young and unmarried. Then the selection of Balwant Singh for adoption is mentioned and this is succeeded by the following passage:—"This 13th day of January, 1898, after performing the necessary ceremony, I adopted

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Balwant Singh, son of Chaudhri Ram Newaz to myself and my husband in the presence of the gentry, the district authorities, and other European gentlemen, and the members of my brotherhood, and Chau lthri Ram Newaz the natural father of the said Balwant Singh, gave Balwant Singh to me as an adopted son." The document provides that so long as the plaintiff lives she should remain the owner and possessor of the estates. This instrument bears the signatures of no less than 28 attesting witnesses, and as we have said was registered upon the admission of execution of the plaintiff herself.

In the contemporaneous document which was executed by Ram Newaz, he admitted that he had given his son Balwant Singh to the plaintiff as an adopted son for her and her husband, and that the usual religious ceremonies and those connected with the *bradari* had been performed with all publicity the same day. Six witnesses attest the execution of this document including the defendant Balwant Singh. In the first mentioned document, there is a positive assertion by the plaintiff that she had authority to adopt Balwant Singh.

In addition to this we have the positive assertion of the plaintiff in her written statement in the suit of *Baldeo Singh v. Rani Dharam Kunwar and Balwant Singh* that she had authority to adopt the defendant. In the 8th paragraph of that written statement (No. 224 of the record) is the following passage "The defendant adopted Balwant Singh defendant under lawful authority with full publicity. The said adoption is valid in every respect." We have thus clearly established the representation of authority to adopt made by the plaintiff and also the fact of the adoption. In addition to this, it is an admitted fact that the marriage of the defendant was carried out by and at the expense of the plaintiff. It is also not disputed that after his adoption, the defendant performed the *sraddh* ceremonies of Raja Raghubir Singh. In his evidence Balwant Singh deposed that "the first *kanagat*, *i. e.*, offering of cakes and oblations of water to the names of ancestors which took place after adoption, was caused by the Rani to be observed by me. Afterwards I continued observing the *kanagat* which took place." This is not contradicted. The question then is whether or not in view of these facts the

court below was right in holding that the plaintiff is estopped from denying her authority to adopt the defendant?

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We are not aware of any case and none has been cited to us in which a plaintiff has successfully raised such a contention as has been laid before us by the plaintiff's learned Advocate. In the most solemn way plaintiff represented that she had authority to adopt and allowed the adoption of the defendant to be carried out with the utmost publicity and with great pomp and ceremony. Moreover she executed a document which should serve thereafter as evidence of the fact of the adoption. In the last paragraph of it, we find the statement that "this document which is a deed of adoption, has been executed by me and I have affixed my seal to it with my own hands in order that it may serve as evidence." After the adoption the defendant lived with the plaintiff as her adopted son, was married as such at her expense and, as we have said, performed the *sraahs* of her husband.

It is contended on her behalf that the conduct of the plaintiff does not operate as an estoppel, that in order to create an estoppel, it must be shown that the person setting it up has suffered some loss or detriment, and that in this case the defendant could not show that he had suffered any loss or detriment, that both families belong to the same *gotra* and that the defendant can return to his father's house and obtain the share of his father's property, that the fact that he held the position of a Raja for some years was beneficial to him and in no way detrimental. We do not agree as to this. The experience of the defendant as a Raja would entirely unfit him for the life of a cultivator. But if it were necessary to show pecuniary loss, we find that the defendant incurred heavy liabilities in defending his adoption in the suit brought by Baldeo Singh. In his evidence he deposed, and he is not contradicted, that Man Singh prosecuted this suit on his behalf and paid the expenses of it, and that some of the money expended by him was still due and further that Lala Nirnanjan Lal, an Honorary Magistrate of Saharanpur had lent him a sum of Rs. 23000. If he had not been led to believe that he was the adopted son of Raja Raghubir Singh, he would not have incurred these liabilities, large sums of money would undoubtedly not have been lent to him. So that if it were

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necessary to prove detriment or loss from the conduct of the plaintiff on which the estoppel is based, these facts are in our opinion sufficient for that purpose. Section 115 of the Evidence Act regulates the law of estoppel. It prescribes that "When one person has by his declaration, act or omission intentionally caused, or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." Lord Shand observed of this doctrine as follows "What the law and the Indian Statute mainly regard is the position of the person who was induced to act and the principle on which the law and the statute rest is that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it; if the person who made the statement did so without full knowledge or under error, *sibi imputet*. It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error to throw the consequences on the person who believed his statement and acted on it, as it was intended he should do" (*Sarat Chander Day v. Gopal Chander Laha*) (1). To allow the plaintiff to repudiate the adoption would not only, we may observe in this case be detrimental to the defendant but to third parties such as the creditors of the defendant who advanced money to him on the faith of his position as Raja. It is highly probable also that acting on the same assurance, his wife's father gave her in marriage to him. We know of no authority and none has been cited to us in which a widow who had taken a boy in adoption to her husband was afterwards successful in a suit for a declaration that the adoption was invalid. Two cases in this High Court were cited to us in which a similar suit failed. The first is the case of *Sukhbasi Lal v. Guman Singh* (2). In that case an adoptive father claimed a declaration that the defendant was not his adopted son on the ground, amongst

(1) [1892] I. L. R. 20 Cal., 296 at p. 311. (2) [1879] I. L. R., 2 All., 366.

others, that he had not been adopted in the manner and according to the ceremonies required by Hindu Law, and had failed to perform a certain agreement entered into by him with the plaintiff. In this agreement the plaintiff agreed on his part to consider the defendant as an adopted son. The defendant set up as a defence to the suit that the plaintiff could not be allowed to deny the validity of the adoption as in a petition presented by him to the Revenue Court on the 27th of April, 1860, he had declared that he had adopted the defendant, that all the ceremonies of adoption required by Hindu Law had been performed, and that the defendant would succeed to his property on his death and had confirmed such declaration by his subsequent conduct, and the defendant had been excluded from inheriting his natural father's property. The court of first instance held that the plaintiff was estopped from denying the validity of the adoption. On appeal this decision was upheld. Spankie, J., in his judgment observed "The plaintiff having himself affirmed the adoption as having been fully and formally made after the performance of all the ceremonies required by the Hindu Law cannot now disaffirm it and sue for a declaration that it is invalid. Indeed when the adoption has once been absolutely made and acted on for years, it cannot be cancelled. It is certain that an adopted child cannot renounce the family of his adoptive father. He is entirely separated from his own family when his natural father disposes of him. The adoptive father in accepting an adopted son is bound by his act which secures to the adopted son all the rights of a son born to the family. He is as much a son as if he had been begotten by his adoptive father." The only difference between this case and the case before us is that in it the adoptive father and the adopted son belonged to different *gotras*, whilst in this case they belonged to the same *gotra*. This does not we think materially differentiate the two cases.

The other case is that of *Durga v. Khushalo*<sup>(3)</sup>. In that case on the death of her husband Kishen Lal, the respondent Khushalo admitted in the Revenue Court that her husband had adopted Durga, the appellant, and prayed that her and his names might be recorded in respect of the property left by her

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husband. Subsequently the daughters of Kishen Lal sued Khushalo and Durga for a declaration that Durga was not the adopted son of Khushalo, and obtained a decree. After that Khushalo brought a suit against Durga for possession of her husband's estate, claiming as her husband's heir, and denying the adoption of Durga. STRAIGHT, and TYRRELL, JJ. dismissed the suit holding that in view of her declaration and conduct in the revenue court, the respondent was not competent to maintain the suit and that as between her and Durga she was estopped from maintaining it. This was a much weaker case for the application of the doctrine of estoppel than the one which is before us.

The learned Advocate for the respondents relied upon the decision in *Thakoor Oomrao Singh v. Thakooranee Mehtab Koonwer* (1). In that case the plaintiff claimed to succeed to certain property as the adopted son of Thakoor Chattarbhooj Singh, the husband of the defendant Thakooranee Mehtab Koonwer. The daughter of Thakoor Chattarbhooj Singh was also impleaded as a defendant. The plaintiff appears to have been brought up and regarded as an adopted son and as the heir to the property up to the end of 1863 when in the record of the paper of administration of Kotla Khas, the estate in dispute the Thakooranee designated Oomrao Singh as one brought up and educated at her expense from childhood saying that his succession on her death was to depend upon her pleasure, it being conditional on his good behaviour. This declaration gave rise to ill-feeling and disputes which ultimately led to the suit. The plaintiff set up the case that he was validly adopted. Mehtab Koonwer denied the adoption. The other defendant in her written statement denied that any authority to adopt had been given and she also contended that an agreement of the 22nd of January, 1864, which purported to settle the right in the property upon the plaintiff was not binding on her. It was contended that it did not lie in the mouth of Mehtab Koonwer to disclaim the plaintiff as a son and to deny his right to succeed to the property of her husband after her treatment and recognition of him as an adopted son for 14 years. It was held that she was not estopped from doing so on the ground

(1) [1868] H. C. R., N. W. P., 103.

that it was never the intention of the Thakooranee that the plaintiff should supersede her in the management and enjoyment of the property without her consent and that she had not precluded herself from setting up the rigid provisions of the Hindu Law ; in other words that if there had been no valid adoption, she might resist the attempt to eject her upon that ground ; seeing that she intended to retain possession during the term of her life. It was further held that a valid adoption was not proved by the plaintiff and his suit was dismissed. It will be observed that in this case an estoppel could not be set up as against the second defendant and that the suit was not one by an alleged adoptive mother to have an adoption set aside but was a suit by the plaintiff claiming possession of the adoptive father's property. This case therefore does not give much support to the plaintiff's contention.

Upon the whole, we are of opinion that the court below rightly held that the plaintiff was estopped from setting up the alleged invalidity of the plaintiff's adoption. Plaintiff represented that she had authority to adopt, and this representation was acted on by the defendant. The ceremony of adoption was carried out on the faith of this representation. The marriage of the defendant was likewise on the strength of it celebrated and the defendant performed the *sradh* ceremonies of his adoptive father. In addition to this we have the fact that the defendant resisted the suit of Baldeo Singh in which the validity of the adoption was impeached and was supported in his defence by the plaintiff and incurred heavy liabilities in raising funds for the purposes of his defence. These matters appear to us to put it out of the power of the plaintiff to maintain a suit for a declaration that her solemn act of adoption was without authority. We are supported in this view by the decision in the following cases. *Kannammal v. Virasami* <sup>(2)</sup> *Ravji Vinayak Rav Jagan Nath Shankar sett v. Lakshmi Bai* <sup>(3)</sup> *Santappayya v. Rangappayya* <sup>(4)</sup>. We might further say that the suit in so far as it is a suit for a declaration that the plaintiff had no power to adopt is one in which it is discretionary with the court to give or refuse relief. We should hesitate in the circumstances of this case

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(2) [1892] I. L. R. 15 Mad., 486. (3) [1887] I. L. R. 11 Bom., 381.

(4) [1894] I. L. R. Mad., 397.

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before passing a decree in favour of the plaintiff for such a declaration in view of her conduct and of the false position in which the defendant would be placed, if her representation as to authority were held not to be binding on her. We therefore dismiss the appeal with costs, including fees in this Court on the higher scale.

*Appeal dismissed.*

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1908.

July, 14.

RICHARDS, J.

KARAMAT

HUSAIN, J.

RAM DIHAL RAI AND OTHERS

versus

MAHARAJA OF VIZIANAGRAM.\*

*Transfer of Property Act (IV of 1882), section 91—Mortgage by fixed rate tenant—Redemption by zemindar—Interest in the land—Fixed rate tenant dying childless—Lapse to the Crown.*

The person claiming redemption of property must prove that he has an interest in it. Where a fixed rate tenant dies childless, the tenancy vests in the Crown. *Rani Sonet Kunwar v. Himmat Bahadur*, L. R., 3 I. A., 92. The mere fact that the zemindar has a proprietary interest in the land out of which the interest of a fixed rate tenant is carved does not give him an interest in the mortgaged property, within the meaning of section 91 of the Transfer of Property Act.

FIRST APPEAL from an order of Babu Sirish Chandar Bose, Subordinate Judge of Ghazipur, reversing a decree of Babu Kalka Singh, Munsif of Ballia.

Suit for redemption of a mortgage.

Plaintiff came into court alleging that he was the zemindar of the land in suit and of which Raghunandan Rai was a tenant at fixed rate. Raghunandan Rai mortgaged it to the defendants or their ancestors. He died leaving no heirs, hence the plaintiff as his representative was entitled to redeem. The defence, *inter alia*, was that the plaintiff was not entitled to redeem.

The court of first instance finding that the plaintiff was not the zemindar but only a muafidar, and mortgagor having died childless the land in suit lapsed to the Crown, dismissed

\* F. A. F. O. 31 of 1908.

the suit. The lower appellate court reversed the decree, and remanded the case for trial on the merits.

Defendants appealed.

*M. L. Agarwala*, for the appellants, contended that the tenancy could not lapse to the zemindar as the tenant had a permanent and heritable interest in it, on the contrary, it lapsed to the Crown, on account of the tenant dying childless. He relied on

*Rani Sonet Kowar v. Mirza Himmat Bahadur*, (L. R., 3 I. A., 92).

*Jagobandhu Phani*, (for *S. C. Banerji*), contended that the tenancy lapsed to the plaintiff who was the zemindar.

The judgment of the Court was delivered by

RICHARDS, J.—This was a suit brought by a zemindar to redeem a mortgage made by a fixed rate tenant.

The plaintiff claimed that the fixed rate tenant had died without heirs and that accordingly he was entitled to redeem the mortgage. The court of first instance, in what we think a well considered judgment, dismissed the claim.

The lower appellate court reversed the decree of the court of first instance and held that the plaintiff was entitled to redeem. The learned Judge commences by saying that the admitted facts of the case are that the tenancy was a fixed rate tenancy the tenant had died heirless. The lower appellate court ought to be very careful in stating that facts are admitted unless they really are. This court has to accept the finding of fact of the lower appellate court. In the present case the *onus* of proving that the tenant died heirless lay upon the plaintiff, and we need hardly say that this was an *onus* which it would be extremely difficult for any plaintiff to prove. We doubt very much whether the fact that the tenant died without heir was ever admitted by the defendants. However in the view which we take this matter is not very material. In our judgment, the tenancy did not lapse upon the death of the tenant without heir. The tenancy has now vested in the Crown if the tenant died without heirs, *Rani Sonet Kowar v. Mirza Himmat Bahadur and others*. (1). In order to redeem, the person seeking re-

(1) [1876] L. R., 3 I. A., 92.

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demption must have an interest in the "mortgaged property." The "mortgaged property" in the present case was the interest of a fixed rate tenant and the mere fact that the zemindar has a proprietary interest in the land out of which the interest of a fixed rate tenant is carved does not give him "an interest in the mortgaged property" within the meaning of section 91 of the Transfer of Property Act.

Both parties admit that the same question as arises in this appeal arises in F. A. F. O. No. 33 of 1908 and that the same judgment rules both cases.

We allow this appeal, set aside the decree of the court below, and restore that of the court of first instance with costs in all courts.

B. C. M.

*Appeal decreed.*

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1908.

May, 18.

AIKMAN, J.  
GRIFFIN, J.

FAZAL-UR RAHMAN AND OTHERS

*versus*

SHAH MUHAMMAD KHAN AND OTHERS.\*

*Limitation Act (XV of 1877) Sch. II., art. 179—Decree in appeal—  
Limitation runs from date of.*

When an appeal is entertained and an order is made by the court to which the appeal is preferred, which has the effect of finally disposing of the appeal time for execution runs from the date of the order of the appellate court.

Where an appeal was not pressed before an appellate court and was dismissed *held*, that the time began to run from the date of the decree in appeal.

*Jeeyangar v. Lakshmi Bai*, 16 M. L. J., 393, followed. *Hingan Khan v. Ganga Parshad*, 1 L. R., 1 All., 393. *Fazl Husen v. Raj Bahadur*, 1 L. R., 20 All., 124, distinguished.

APPEAL against the decree of the Subordinate Judge of Aligarh.

Application for execution

The facts appear from the judgment

\*F. A. No. 218 of 1907.

*Ghulam Mujtaba* (with him *Muhammad Ishaq*), for the appellant.

*William Wallach*, for the respondents.

The judgment of the Court was delivered by

AIKMAN, J.—The sole question raised in this appeal is whether an application for execution presented by the appellants is or is not barred by limitation. The application was to execute two decrees which were passed on the 8th of March, 1901. Against these decrees appeals were preferred to this Court. When the appeals were called on for hearing, the learned counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment, decrees were passed by this Court affirming the decrees of the lower court. It is admitted that the appellants' present application is within time, if time is reckoned from the date of the decrees of this Court, but would be barred by limitation if time be computed to run from the date of the decrees of the Court of first instance. The lower court has held that as the appeals to this Court were not supported, time must be held to run from the date of the decrees of the court of first instance, and has accordingly dismissed the application as barred by limitation. Against the order of the lower court the present appeal has been preferred. In our judgment the appeal must succeed. It seems to us that the language of Article 179 of Sch. II of the Limitation Act is perfectly clear and is in favour of the appellants' contention. That article allows three years from the date of the decree or order, or, where there has been an appeal, from the date of the final decree or order of the appellate court. There was undoubtedly an appeal in the case before us, and a final decree was passed by the appellate court. The application is within three years from the date of the final decree. For the respondents reliance is placed upon two decisions of this Court in *Hingan Khan v. Ganga Parshad* <sup>(1)</sup> and *Fazal Husen v. Raj Bahadur* <sup>(2)</sup>. In our opinion, these cases are distinguishable from the present as in the former the appeal was withdrawn, and the question which had to be dealt with was as to the time to be allowed for

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(1) [1896] I. L. R., 1 All., 293. (2) [1897] I. L. R., 20 All., 124.

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payment of pre-emption money. Moreover, the language of article 179 was not referred to. In the second of these, to which one of us was a party, the appeal abated. It appears that the decree-holder in that case appealed against one Hardayal, a judgment-debtor. Hardayal died, and the decree-holder failed to bring on the record his legal representatives. It was held that the only extant decree was the original decree of the Munsif. In the Full Bench case of *Jeeyangar v. Lakshmi Dass* <sup>(3)</sup>, the Madras High Court held that when an appeal is entertained and an order made by the court to which the appeal is preferred which has the effect of finally disposing of the appeal, time for execution runs from the date of the order of the appellate court. The learned Judges in that case dissented from certain decisions of the Bombay High Court in which an opposite view had been taken. We agree with the opinion expressed by the Full Bench of the Madras High Court. If a judgment-debtor's appeal, as sometimes happens, is pending for upwards of three years, and if it were held that the appellant judgment-debtor, by withdrawing or declining to support his appeal, or by omitting to bring on the record the representatives of a deceased respondent, could, notwithstanding the fact that an appeal had been filed, cause time to run from the date of the original decree, it would in our opinion be going directly against the language of the Limitation Act and would open a door to fraud. We allow the appeal, and, setting aside the order of the lower Court, send back the case to that Court with instructions to re-admit the application under its original number in the register and dispose of it according to law. The appellants will have the costs of this appeal. Other costs will follow the event.

*Appeal decreed.*

(3) 16 M. L. J.. 393.

## PARTAP SINGH

*versus*

## THE DELHI AND LONDON BANK, LIMITED.\*

*Code of Civil Procedure (Act XIV of 1882), section 503—Power to appoint receiver—Execution of decree.*

Section 503 of the Code of Civil Procedure gives the court power to appoint a receiver where the decrees passed against third parties in favour of the judgment-debtor are attached in execution and where it appears that by so doing the interest of the parties will be saved

APPEAL against the order of Babu Girraj Kishor Dutt, Subordinate Judge of Bareilly.

The facts appear from the judgment.

Application to appoint a receiver.

The court below dismissed the application.

Judgment-debtor appealed.

*Satish Chandra Banerji*, for the appellant.

The respondents were not represented.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal from an order of the court below refusing the appellant's application, for the appointment of a receiver. The respondent Bank, which is not represented here, held a decree against the appellant for Rs. 35,000. In execution of this decree the respondent Bank attached two decrees held by the appellant, the aggregate amount of which is said to be upwards of a lakh of rupees. The Bank applied for sale of the decree. The judgment-debtor presented an application to the lower court stating that if the decrees were sold, the result would be that both he and the Bank would be losers, and he prayed the court to appoint a receiver to realize the amount of his decrees attached by the Bank. The learned Subordinate Judge in his order under appeal states that the judgment-debtor's case is a pitiable one, as there is very little likelihood of the decrees fetching a suitable price at the

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AIKMAN, J.  
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*Aikman, J.*

\* F. A. F. O. No. 35 of 1907.



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auction sale. But he was of opinion that section 503 of the Code of Civil Procedure did not apply to a case like the present, and accordingly rejected the application. In our opinion the opening words of the section are wide enough to cover a case like the present. We accordingly allow the appeal, set aside the order of the lower court, and remand the case to that court with instructions to re-admit the application under its original number in the register and adopt proper steps for the appointment of a receiver. We make no order as to costs.

*Appeal decreed.*

CIVIL.

1908

March, 23.

KARAMAT  
HUSAIN, J.

ASMA BIBI

versus

AHMAD HUSAIN AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882) sections 206, 551—Effect of dismissal of appeal under that section—Whether decree or order—Amendment.*

The dismissal of an appeal under section 551, Code of Civil Procedure, is a decree which supersedes the decree of the Court below. Hence the only Court which has jurisdiction under section 206 of that Code to amend the decree is the Court which has acted under section 551.

Application to revise an order of the Subordinate Judge of Jaunpur

Application for amendment of decree.

The material facts appear from the judgment.

*Baldeo Ram Dave*, for the applicant.

*B. E. O'Connor* (for whom *Sital Prasad Ghose*), for the opposite party.

The following judgment was delivered by

*Karamat  
Husain, J.*

KARAMAT HUSAIN, J.—The facts of the case are the following:—In a suit for their shares in the property left by one Aminuddin, deceased, a plaint was presented on behalf of Asma Bibi and others against Ahmad Husain and others to the learned Subordinate Judge of Jaunpur.

\* Civil Revision No. 18 of 1907.

The suit was contested by the defendants. The learned Subordinate Judge of Jaunpur returned the plaint to be presented to the learned Subordinate Judge of Benares, and on the 8th February 1906 a formal order was framed by the learned Subordinate Judge of Jaunpur which awarded full costs to Asma Bibi and others. The judgment-debtors appealed against that order to the High Court under section 583, clause (6), of the Code of Civil Procedure. In the memorandum of appeal objection was taken to the full costs. A Bench of this Court dismissed the appeal under section 551, clause (1), of the Code of Civil Procedure on the 24th May 1906.

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Prior to the dismissal of appeal under section 551, the judgment-debtors had applied to the court below for the amendment of the decree dated 8th February 1906 under section 206 of the Code as to the full costs. The court below after that dismissal under section 551 amended its decree on the 26th of May 1906. One of the decree-holders comes to this Court in revision under section 622 of the Code of Civil Procedure on the ground that the court below had no jurisdiction to amend a decree confirmed by the High Court.

The question whether the court below in such a case has or has not jurisdiction to amend its own decree is of much practical importance, and its determination depends upon determining the nature of the dismissal of an appeal under section 551, clause (1). If the dismissal is a decree, it supercedes the decree of the court below, and that court has no jurisdiction to amend the decree of this Court, but if the dismissal is an *order* as distinguished from a *decree*, the decree of the court below is the only decree in existence and that court can amend it. The Calcutta and Madras High Courts have held that a dismissal under section 551, clause (1) is a *decree*—see *Uma Sundari Devi v. Bindu Bashini Chowdhurani* (1), *Peary Mohan v. Mahendra Nath* (2) and *Munisami Naidu v. Munisami Reddi* (3). The Bombay High Court in *Bapu v. Vajir* (4), however, ruled that the dismissal of an appeal under

(1) [1897] I. L. R., 24 Cal., 759.

(2) [1906] 4 C. L. J., 566.

(3) [1899] I. L. R., 22 Mad., 293.

(4) [1897] I. L. R., 21 Bom., 548.

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section 551 of the Civil Procedure Code (Act XIV of 1882) leaves the decree of the lower court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower court which can amend it or bring it into accordance with its judgment.

This view is based not upon any principle but upon the change of language made in section 551 by section 47 of Act VII of 1888 as appears from the following remarks of the learned Judges. They say.—“The change of language made in 1888 in that section by the Legislature shows, we think, that it was intended that there should be a difference between the results of a dismissal under it and of a confirmation under section 577, as indeed we think, there must be. Dismissing an appeal is, we think, refusing to entertain it, as in the case of an appeal dismissed being time barred. Where an appeal is dismissed under section 551, there is no decree of the High Court which can be executed.”

To my mind the view taken by the Calcutta and Madras High Courts is more in keeping with the principles on which the Law of Procedure is based than the view of the Bombay High Court. The dismissal of an appeal under section 551, clause (1) of the Code of Civil Procedure, is a final adjudication upon the rights of the parties to the appeal and is therefore a decree within the definition of that term in the Code.

Again the admission of an appeal is a condition precedent to the exercise of the power conferred by section 551, clause (1)—see *Rudr Prasad v. Baijnath*.<sup>(1)</sup> The hearing of the appellant or his pleader by the terms of the section is also a condition precedent to the exercise of that power and if an appeal is dismissed after it has been admitted and heard the dismissal must result in a decree superseding that of the court below.

A Full Bench of this Court in *Thakur of Masuda v. The Widows of the Thakur of Nandwara*.<sup>(2)</sup> remarks:—“For it was, although a proceeding under section 551 and therefore *ex parte*, of such a nature that judgment upon it against the appellant finally disposed of the case on the

(1) [1893] I. L. R., 15 All., 367, at p. 369.

(2) [1880] I. L. R., 2 All., 819; at p. 823.

merits." The remarks show that an appeal is disposed of under section 551 on the merits. This being the case the dismissal can be nothing but a *decree*.

Besides, the appellate court as soon as it admits an appeal is seised of it—see *Kristnama Chariar v. Maigammal* <sup>(1)</sup> and the Code of Civil Procedure or any other Act has conferred no power upon such appellate court in such a case to so refrain from deciding the appeal as to leave the decree of the court below unsuperseded. "The function of an appellate court," their Lordships of the Privy Council say, "is to determine what decree the court below ought to have made. It may affirm, reverse or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding it may be an order for the payment of the costs of the appeal or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given"—*Kistokinker Ghosh Roy v. Burrada Caunt Singh Roy* <sup>(2)</sup>.

Such being the function of an appellate court, it cannot refuse to entertain an appeal which has been admitted and in which the appellant or his pleader has been heard, nor can it in such a case leave a decree of the court below so 'untouched' as to give it jurisdiction to amend its own decree after the dismissal of the appeal under section 551, clause (1) of the Code. To say that the appellate court has such a power and that it has been conferred upon it by amending section 551 and substituting "dismiss the appeal, etc.," for "confirm the decision of the court, etc.," is more than I can comprehend. To give an appellate court the power of refusing to entertain an appeal which has been admitted and in which the appellant has been heard and of refraining from passing a decree which should supersede the decree of the court below is opposed to the objects for which the courts of appeal are established and cannot be inferred from a slight change made in the language of section 551.

Their Lordships in the case of *Kistokinker*, no doubt, remark that "there may be cases in which the appellate court particularly on special appeal might see good reason to limit its decision to a simple dismissal of the appeal, and to abstain

(2) [1903] I. L. R., 26 Mad., 91; at p. 96. (3) 10 B. L. R. 101; at p. 113.

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from confirming a decree erroneous or questionable, yet not open to examination by reason of the special appeal," and the learned Judges who decided *Venkatanarasimha Naidu* <sup>(1)</sup> with reference to those remarks say to the effect that the language of the Judicial Committee suggests a distinction between a confirmatory decree and a decree which simply dismisses the appeal. Those remarks, anyhow, cannot be construed to mean that the dismissal of an appeal under section 551, clause (1), is not a decree. The learned Judges who decided *Bapu v. Vajir* <sup>(2)</sup> have themselves conceded that the dismissal under section 551 is a decree. They say :—"Mr. Govardhan argues that the dismissal of the appeal under section 551 is a decree and appealable under section 584. That may be conceded ; still it is clearly not confirming the decree of the lower court." They have, however, drawn a distinction between a confirmatory decree and a decree which simply dismisses the appeal without noticing the results to which the distinction leads. In cases of dismissal under section 551, clause (1), it leads to the existence of two decrees in one and the same case at one and the same time, *i.e.*—

(a) The decree of the court below which according to the learned Judges is untouched.

(b) The decree of the appellate court which simply dismisses the appeal without confirming the decree of the court below.

When an appeal is dismissed as time barred, it is to be remarked, with due respect to the learned Judges, that the appellate court in such a case does not passively refuse to entertain it. It actively determines the rights of the parties to the appeal. Such determination being an exercise of the function of the appellate court gives a fresh starting point of limitation—see *Akshoy Kumar Nundi v. Chunder Mohan Chathati* <sup>(3)</sup>, and *Murlidhar v. Tapeshri Rai* <sup>(4)</sup>. The learned Judges say that "where an appeal is dismissed under section 551 there is no decree of the High Court which can be executed." If they mean that no decrees as a matter of practice are framed, their reasoning, with the

(1) [1903] 10 Mad. L. J., 260.

(2) [1897] I. L. R., 21 Bom., 548.

(3) 1888] I. L. R., 16 Cal., 250.

(4) [1894] A. W. N., 46.

utmost respect to the learned Judges, proves nothing. The omission to frame a formal decree cannot establish that the dismissal under section 551 is not a decree. If they mean that the dismissal is not a decree, they, with due deference to them, not only beg the question but contradict themselves for they have "conceded" that the dismissal is a decree. There is nothing in the Code of Civil Procedure to prohibit the preparation of a decree when an appeal is disposed of under section 551.

A reference to the printed judgments of the Bombay High Court for 1891, pp. 58 and 239 shows that the Court, adopting the view of the Madras High Court in *Royal Reddi v. Linga Reddi* <sup>(1)</sup>, that there should be a judgment and decree in cases dealt with under section 551, issued a general rule to that effect for the guidance of the subordinate courts. I, however, presume that these judgments and the general rule as to the framing of decrees in cases dealt with under section 551 were not brought to the notice of the learned Judges who decided *Bapu v. Vajir*. Had those judgments and the general rule been brought to their notice, they might have arrived at a different conclusion.

For the above reasons, I am of opinion that the dismissal of an appeal under section 551 clause (1), is a decree; that it supersedes the decree of the court below, and that in the case before me the High Court is the only Court which has jurisdiction to amend the decree under section 206 of the Code of Civil Procedure.

I therefore allow the application for revision, and set aside the order of the learned Subordinate Judge of Jaunpur, amending the decree dated the 8th February, 1906, as to the full costs. I make no order as to costs.

*Order set aside.*

(1) [1880] I. L. R., 3 Mad., 1.

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July, 25.

STANLEY, C. J.  
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KASHI PRASAD AND ANOTHER

versus

INDAR KUNWAR.\*

Mukaddam—*Inferior proprietor—Grant by Government to Hindu widow of superior proprietary rights—Nature of estate taken by widow—Graft—Trust.*

J's husband and some other persons were inferior proprietors (*Mukaddams*) of a village. After death of J's husband, Government conferred the *zemindari* rights upon J, and these other persons. Held, that the inferior proprietors acquired these *zemindari* rights by virtue of and not independently of their pre-existing estate, the inferior estate thus becoming merged as it were in the superior interest. J therefore could not deal with the estate as her absolute property.

*Per* STANLEY, C. J. Even if the act of Government amounted to a grant of the *zemindari* rights to J, the doctrine of *graft* would be applicable and she became a constructive trustee of the rights so acquired for the parties entitled to the whole interest. *Keech v. Sandford*, 2 Wh. and T. Eq. C., 693, referred to.

APPEAL against the decree of Pandit Girraj Kishore Dutt, Subordinate Judge of Bareilly.

Suit for possession of certain immoveable property.

The statement of facts is taken from the judgment of

*Stanley, C. J.*

STANLEY, C. J.—“This appeal arises out of a suit for possession of a share in the vallage of Kanai Shibnagar in the District of Bareilly and for mesne profits. The facts are these. One Newal Rai was the owner of this as well as other property. He died before the year 1872 leaving a widow Musammat Jaika and two daughters, namely, Musammat Bilaso and Musammat Hulaso. One Banarsi Das purchased the property in suit at a sale in execution of a decree obtained against Musammat Jaika. The defendants Kashi Prasad and Basdeo Sahai are the brothers of Banarsi Das who is dead. Five kachwansis of the property is in the possession of the defendants 3 to 8 and as to this portion the plaintiffs' suit has been dismissed and we are not concerned with it in the present appeal. Musammat Jaika died on the 27th of No-

\* No. 276 of 1906.

vember, 1878, and after her death, her daughters Bilaso and Hulaso sold  $\frac{3}{4}$ th of the property to Musammat Lachman and three others. A suit was brought by the vendor and vendees for possession of the village of Hafizpur not the village in dispute and the suit was decreed on the 18th of May, 1881, and on appeal the decree for possession was affirmed by the High Court. Musammat Hulaso died in the year 1894, and her sister Musammat Bilaso died on the 15th of September, 1895, Musammat Hulaso left a son Majnun Lal and he on the 15th of June, 1904, sold the village in dispute to the plaintiff Musammat Indar Kunwar. The present suit was instituted on the 11th of December, 1905, so that it was brought within 12th year from the deaths of Musammat Hulaso and Musammat Bilaso.

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One of the defences set up was that the debt of Musammat Jaika in respect of which the property was sold was incurred for legal necessity. This defence was not established, and it has not been raised before us. Another plea raised was in regard to the  $\frac{3}{4}$ th of the property which was sold by Musammats Hulaso and Bilaso on the 8th of January, 1881. The plea was that this sale was carried out for legal necessity and that the plaintiff as representative of Majnun Lal was bound by it. This is the subject of the connected appeal No. 280 of 1906. As to the entire of the village the main and important defence was that the property was not the estate of Newal Rai and did not devolve on Musammat Jaika as his heir, that Newal Rai was only a *mukaddam* of the property being recorded as lambardar and that after his death the Government conferred proprietary rights on Musammat Jaika and she thus acquired the absolute estate and did not inherit it from her husband and that consequently Banarsi Das who purchased the property at a sale in execution of a decree obtained against Musammat Jaika acquired an absolute estate in it. This was the main contention before us of the defen'tants appellants.

The circumstances which led to the intervention of Government in regard to this estate were these. Raja Kheri Singh owned the village in dispute and a number of other villages as zamindar but under him were inferior proprietors who are described as *mukaddams*. Raja Kheri Singh made



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default in payment of the Government Revenue and in consequence the Government determined to make settlement with the under-proprietors and the under-proprietors engaged with the Government for the payment of the Government Revenue, and *malikana* allowance of Rs. 10 per cent of the Government Revenue was allowed to the Raja. The settlement was so made with Musammat Jaika after the death of her husband and it is this settlement which forms the basis of the claim that Musammat Jaika by grant from Government became in her own right the absolute owner of the village in dispute with other property."

The court below decreed the suit.

Defendants appealed.

*Motilal Nehru* (with him *S. C. Banerji*), for the appellants, cited

*Bhagwati Prasad v. Hanuman Prasad Singh* [1900] I. L. R., 23 All., 67.

*Mayne, Hindu Law and Usage*, Ed. 7, section 286, p. 358.

*Brijindar v. Janki Koer*, [1877] L. R., 5 I. A., 1; 1 C. L. R., 318.

*Braja Kishore v. Kundana*, [1899] L. R., 26 I. A., 66, I. L. R., 22 Mad., 431.

[STANLEY, C. J., referred to the doctrine of graft well known 'at home' and embodied in section 90 of the Indian Trusts Act, II of 1882.]

There was no question of life tenancy or trust here. Certain persons, including the lady's husband, held inferior proprietary rights. Several years after the death of the husband, when the widow had already inherited such rights from her husband, the local Government granted full proprietary rights to her and the other inferior proprietors. These others were males and they admittedly took an absolute estate; why should the lady then be held to have taken only a Hindu widow's estate under the self-same grant? A woman may inherit a widow's estate from her husband, but how can she take a *widow's* estate under a grant made by the Sovereign Power professedly of the entire estate and long after her husband's death? The full proprietary estate which the Government is reported to have granted her had never belonged to her husband.

*J. N. Chaudri* (for *Sundar Lal*), for the respondent, argued upon the evidence especially with reference to the *Sudder*

Dewany Adalut judgment of the 27th of August, 1861, that it had not been shown that the so-called *mukaddami* rights in this case were other than proprietary rights, or that any higher rights as a matter of law or fact had been conferred upon the *mukaddams* by the subsequent Government grant relied upon by the appellants. The widow took, as such, only what her husband had already held. He further contended that "if the widow acquired any property by reason of being the widow of her deceased husband, she could not hold it on any terms other than those on which she held the property she had inherited from her husband."

*Motilal Nehru* was heard in reply.

The following judgments were delivered by

[Stanley, C. J., after stating the facts as set forth above continued :]

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It does not appear that any *sanad* was granted by Government to Musammat Jaika. The only evidence which has been laid before us on the subject are some records from the Settlement Department and also Judgments of the Civil Courts. One of the records in question is a proceeding before the Settlement Deputy Collector of Bareilly, dated the 4th of September, 1870, relating to settlement of the village of Kaini Shibnagar (No. 58 C of the record). In it the reason is assigned for the nomenclature of the village and successive transfers and from it we gather that the village was populated by Hari Ram Mukaddam about 300 years ago, that subsequently the village-site was washed away by the floods of the Ram Ganga, and that it was afterwards populated by one Sewa Ram. Then follows this statement "At the time of the former settlement Ranis Rup Kunwar and Bas Kunwar, wives of Raja Kheri Singh, were the zamindars and Ganga Ram, Khiali Ram, Gajadhar, Tilok Chand and Newal Rai Mukaddams the lambardars of this village. After the settlement, Newal Rai died and in his stead the name of Musammat Jaika was entered as a lambardar." Then later on an order of the Lieutenant Governor, dated the 24th of June, 1851, is recited to the effect that the zamindari of this village was conferred upon certain persons who are named and amongst others as to 6 biswas 13 biswansis and 5 kachwansis

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on Ganga Ram and Musammat Jaika. Later on we find the statement that on the 10th of March, 1862, an order together with a list of taluqdari villages of Raja Kheri Singh was received from the Lieutenant Governor to the effect that the *mukaddams* should pay to the heirs of Raja Kheri Singh Rs. 10 per cent of the Government Revenue as *malikana* allowance.

In the *khewat* of the village of Kanai Shibnagar, dated the 8th of January, 1870, there appears in the last column the following statement :—" There are two kinds of proprietors in this village *i. e.*, one superior and the other inferior. As under the order of the Government the inferior proprietors have been charged with the payment of revenue the settlement of this village has been made with them. Raja Partab Singh, the adopted son of Ranis Rup Kunwar and Bishen Kunwar widows of Raja Kheri Singh has been declared to be the superior proprietor of this village. Rs. 134 on account of *Malikana* allowance due to him shall as per detail given in column 13 be paid into the Tahsil and he will continue to receive it from the Tahsil treasury. He shall have nothing to do with the collections and assessments of the village.

It appears that the widows of Raja Kheri Singh instituted a suit as his representatives to recover zamindari and mal-guzari possession of the entire estate of Raja Kheri Singh including 87 mauzahs and to set aside the decision of the settlement officer, dated the 24th of June, 1851, by which the plaintiffs' claim was rejected and the zamindari title of Ghulam Husain and others was recognised. The Judge of Bareilly decreed the plaintiffs' claim whereupon an appeal was preferred to the Sadar Dewany Adawlat and we have on the record a copy of the judgment of that Court, dated the 27th of August, 1861. In that judgment a short history of the estate is to be found and official reports are quoted as elucidating the fiscal history of the estate, and the positions of the conflicting claimants. From this, it appears that at the session the name of Kunwar Kheri Singh was recorded as proprietor of the entire pergunah but that the first settlement was concluded generally with the *mukaddams* that at the second settlement Kunwar Kheri Singh engaged for 21 villages and at the third settlement for 26 but that owing to his incapacity and the

fact that the revenue had fallen into arrears, Kunwar Kheri Singh was excluded from the settlement and a suitable provision was made for him as an equivalent for his exclusion from the management of the estate. The learned Judges held that the allowance in question was actually granted as a *malikana* allowance and that the plaintiffs possessed a proprietary title to some extent in all the villages claimed but that the defendants who then engaged with Government for the 54 *mukaddami* villages were possessed of proprietary rights in these villages of a heritable and transferable nature. The conclusion at which the learned Judge arrived was that in the case of the 54 *mukaddami* villages, there existed an inferior proprietary right heritable and transferable which was vested in the defendants then engaging as for these mauzahs.

We gather from this that there was no actual confiscation by Government of the superior proprietary right of Raja Kheri Singh and no grant of that estate to the inferior proprietors. What the Government did was to settle for the revenue with the inferior proprietors reserving to Raja Kheri Singh in respect of his superior proprietary rights a *malikana* allowance. The inferior proprietors no doubt thus acquired zamindari rights which they had not previously enjoyed but these rights were acquired by virtue of and not independently of their pre-existing estate. The inferior estate became as it were merged in the superior interest thus, I may say usurped. Musammat Jaika had succeeded on the death of her husband, Newal Rai, to his estate, and was recorded in the revenue papers as lambardar. Then by virtue of the order of His Honour the Lieutenant Governor to which I have referred she and Ganga Ram acquired zamindari rights in respect of 6 biswas 13 biswansis and 5 kachwansis in the villages in question of which Musammat Jaika was entitled to one half. It is difficult to see how the accretion to her rights, thus acquired, can be regarded as equivalent to a grant by Government to Musammat Jaika in her own right of the estate which formerly belonged to her husband, so as to enable her to deal with it as her absolute property, and disappoint the expectation of her daughters and the other reversionary heirs of her husband to whom the property would, in the ordinary course, have come upon her death.

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The learned Subordinate Judge held that Musammat Jaika inherited the property from her husband and did not in her own right acquire the zamindari rights which Government conferred. He observes as follows :—"It seems clear to my mind that as Musammat Jaika's name was entered in revenue papers in respect of her husband's lambardari rights as heir of her husband, the zamindari rights in the shares in dispute were also conferred on her by Government as representing her deceased husband and as his heir, and she herself had done nothing to merit the grant of zamindari rights to her, and she might never have acquired the zamindari rights, had she not been heir and wife of Newal Rai deceased."

I think that the learned Subordinate Judge was right in the conclusion at which he arrived. Musammat Jaika acquired the property of her husband for a Hindu widow's estate, and by virtue of her ownership derived from her husband acquired from Government the zamindari rights which had not previously been enjoyed. The acquisition of these must I think be taken to be an enlargement merely of the interest to which she was entitled as the widow of Newal Rai and as such be treated as acquired for the benefit of all persons interested as reversioners in the estate of Newal Rai. Even if the act of Government amounted to a grant of the zamindari rights to Musammat Jaika, it appears to me that the doctrine of graft, which is so fully dealt with under the leading case of *Keech v. Sandford* <sup>(1)</sup>, would be applicable. The rule laid down in the principal case is that when a trustee of lease-hold property renews the lease in his own name, he must hold the renewed lease for the benefit of his *cestui que trust*. This rule has been extended, and it is applicable to the case of a purchase of the reversion of an estate by a tenant for life, and is based in such case upon the duty which lies upon a limited owner to act in a matter of the kind for the benefit of the whole interest. The principle is embodied in the Indian Trusts Act 1882. Section 90 of that Act prescribes that "Where a tenant for life, co-owner, mortgagee or other qualified owner of any property by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any

(1) 2 Wh. and T. Eq. Cas., 693.

such owner as representing all persons interested in such property gains any advantage, he must hold for the benefit of all persons so interested the advantage so gained but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage." Here Musammat Jaika who inherited from her husband his estate as tenant for life acquired from Government the zamindari rights which had belonged to Raja Kheri Singh by virtue of her position as qualified owner and thus gained an advantage in derogation of the right of the other persons interested in the property. Consequently she was bound to hold the advantage so gained for the benefit of all persons so interested. If she had not been tenant for life of the property of her husband Government would undoubtedly not have settled with her for the revenue. It was by virtue of her possession of the estate as his widow and not otherwise that she obtained the concession of zamindari rights from Government. If therefore there was a grant from Government to her she became I think, a constructive trustee of the rights so acquired for the parties entitled to the whole interest.

For the foregoing reasons I would dismiss the appeal.

BANERJI J.—I also am of opinion that the appeal should be dismissed. In my judgment the effect of the settlement with Musammat Jaika was to enlarge the widow's estate which she held as heir to her husband Newal Rai. As such widow she held a life-estate in the rights of Newal Rai as *mukaddam*. When the Government made a settlement with her and Ganga Ram the brother of Newal Rai, it only enlarged the mukaddami rights held by them. So that the enlarged rights were held by her in the same capacity in which she held the original rights, namely, as a Hindu widow. I see no reason to assume that absolute rights as proprietor were conferred on her by Government. She was not therefore competent to make the transfer in suit. I express no opinion on the question of graft or on the question whether she may be deemed to have been a trustee for the persons entitled to the estate.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs including fees in this Court on the higher scale.

J. P.

*Appeal dismissed.*

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*Banerji, J.*

## ABDUL KARIM KHAN

*versus*

## MAKBUL UN-NISA BEGAM AND OTHERS.\*

*Succession Certificate Act (VII of 1889), sections 2, 4—Deferred dower—Debt—Mahomedan Law.*

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1908.

April, 4.

STANLEY, C. J.  
BURKITT, J.

Dower whether it be prompt or deferred, is a debt due from the husband to the wife. Deferred dower is a debt payable in the future. A court, therefore, cannot pass a decree for its recovery by the heir of the lady without the production of a succession certificate.

FIRST APPEAL against the decree of Babu Nihala Chandra, Subordinate Judge of Moradabad.

Suit to recover a share of the dower debt.

The court below decreed the suit.

Defendant appealed.

The material facts appear from the judgment.

*B. E. O'Connor* and *Sundar Lal*, for the appellant.

*Moti Lal Nehru*, *Tej Bahadur Sapru* and *Mohan Lal Nehru*, for the respondents.

The judgment of the Court was delivered by

Stanley, C. J.

STANLEY, C. J.—This appeal arises out of a suit brought by the plaintiff, one of the two heirs of Musammat Kadri Begam, the deceased wife of the defendant, for her share of the deferred dower of Mussammat Kadri Begam, which became due on her death. The court below decreed the plaintiff's claim. Of the grounds of appeal only two were pressed before us, one being that the suit was barred by limitation and the other that without the production of a succession certificate the court below was not justified in passing a decree.

As regards the question of limitation, the allegation of the defendant is that Kadri Begam died on the 16th of September, 1902, whereas the plaintiff says that she died on the 19th of that month. If she died on the earlier date, the suit, which was not instituted until the 18th of September, 1905, is barred. We have carefully considered the evidence of the witnesses who were examined for the respective parties. This evidence is

\* F. A. No. 154 of 1906.

very conflicting. But upon full consideration of it, we are quite unable to hold that the learned Subordinate Judge was wrong in the decision at which he arrived. He had the witnesses before him and was in a better position than we are to judge of the credit to be given to their testimony. The evidence of the plaintiff's witnesses is corroborated by an entry of the death in the register of deaths kept at the Police Station at Chowk at Rampur where Kadri Begam died. Siraj-ud-din proved this entry, and according to it Musammat Kadri Begam, in the register described as Kazmi Begam, a name by which she was also known, is stated to have died on the 19th September, 1902.

The next question is as to the necessity for a certificate under Act VII of 1889. Section 5 of that Act prescribes that "no court shall pass a decree against a debtor of a deceased person for a payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof \* \* \* except on the production of (i) probate or letters of administration \* \* \*

(ii) A certificate granted under section 56 or section 57 of the Administrator-General's Act, 1874 \* \* \*

(iii) A certificate granted under this Act and having the debt specified therein, or

(iv) A certificate granted under the Regulation of the Bombay Code No. VIII of 1827.

Sub-section 2 defines "debt" as including any debt except rent, revenue or profits payable in respect of land used for agricultural purposes. Debt is therefore used in a very wide sense. The plaintiff has not produced probate, or letters of administration or a certificate as required by the Act. It is contended on her behalf that, inasmuch as the dower in respect of which she sues was deferred dower, it never was payable to Kadri Begam, and therefore her husband was not her debtor within the meaning of section 4. Reliance is placed upon two decisions of the Calcutta High Court as supporting this contention. The first is the case of *Nemahari Roy v. Musammat Bissessari Kumari* <sup>(1)</sup>, in which it was held that the Succession Certificate Act referred only to debts for the

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(1) [1896], 2 C. W. N., 591.



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recovery of which the successor could sue, and that for debts falling due after death an heir may sue without a certificate. O'Kinealy, and Rampini, JJ, in their judgment observed:—  
“In law we know two kinds of debts which have accrued due and debts not accruing (*sic*) due, but which will be due. Now the Succession Certificate Act refers only to such debts as the deceased could sue upon. The debt in this case has fallen due since the death of the deceased.” The learned Judges do not give any reasons for so restricting the meaning of the word debt. We do not find any language in the Succession Certificate Act to bear out the statement that the Act refers only to debts for the recovery of which the deceased could have sued. The language of the Act is quite general and defines a debt within the meaning of section 4 as including “any debt except rent, revenue or profits \* \*.” Dower whether prompt or deferred is a debt due by the husband to the wife, but in the case of deferred dower is *debitum in praesenti solvendum in futuro*.

The next case is that of *Mahamed Ishaq v. Sheikh Akram-ul-Haq* (²). In that case it was held that when a Mahomedan wife, who has not been divorced by her husband, dies during her husband's life-time, the right to sue for her deferred dower accrues for the first time to her heirs and that the cause of action is not a joint one, but that any of the heirs may sue the husband separately for her share, but that in such a suit the presence of all the heirs is necessary in order effectually and completely to adjudicate upon the claims of the several heirs. We do not find in this case that any reference was made to the Succession Certificate Act. The necessity for the production of a certificate under that Act was apparently not considered.

Now the wife's right to dower whether prompt or deferred accrues as soon as her marriage is validly contracted. She can alienate it, pledge it, or make a free gift of it, either to her husband, or to her relations, or to third parties. Mr. Ameer Ali in his “Personal Law of the Mahomedans” (2nd Edition, page 392) says:—“Dower is a debt like all other liabilities of the husband and has preference over legacies

bequeathed by the testator and the rights of heirs. A partition of the estate cannot take place until the dower debt has been satisfied. When the wife is alive she can recover the debt herself from the estate of her deceased husband. If she be dead her representatives stand in her place and are entitled to recover the same." Dower in fact, whether it be prompt or deferred, is a debt due from the husband to the wife. If the dower be prompt, it is presently payable. If it be deferred it is payable in the case of death or divorce—a debt payable in future, but none the less a debt of the husband. It is a debt which accrued due on the completion of the marriage contract, but a debt payment of which is deferred." "The law," said Brett, M. R. "has always recognized as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future." *Webb v. Stenton* <sup>(1)</sup>. Deferred dower is a debt payable in the future. We think therefore that the Court cannot pass any decree in favour of the plaintiff without the production of a succession certificate. But we also think that the plaintiff should have an opportunity, if so advised, of producing such certificate. Accordingly we shall defer passing a decree in this appeal for a period of two months so as to give an opportunity to the plaintiff of obtaining the necessary certificate. We accordingly adjourn the hearing of this appeal for two months.

(1) [1883] L. R., 11 Q. B. D., 518, 524.

### NANNHI JAN

*versus*

BHURI AND ANOTHER. \*

*Code of Civil Procedure (Act XIV of 1882), section 283—Intervenor—Burden of proof.*

An intervenor, in a suit brought by him, is bound to satisfy the court that the document upon which the claim is founded represents, a *bona fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. *Tulshi Rai v. Ram Das*, [1887] A. W. N., 71; *Afzal Begam v. Muhammad Obaidat Ullah*, [1899] A. W. N., 220; *Ram Nath v. Bindraban*, 1 L. R., 18 All., 369; *Govind Atmaram v. Santai*, 1 L. R., 12 Bom., 270, referred to. *Saba Bibi v. Balgobind*, 1 L. R., 8 All., 178, distinguished.

\* S. A. No. 567 of 1907.

CIVIL.

1908.

ABDUL KARIM  
KHAN

*v.*  
MAKBUL-UN-NISA  
BEGAM.

*Stanley, C. J.*

CIVIL.

1908.

*April, 24,*

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

CIVIL.

1908.

NANNHI JAN

v.

BHURI.

SECOND APPEAL against the decree of the District Judge of Meerut, reversing a decree of the Subordinate Judge.

Suit for declaration of right.

The material facts appear from the judgment.

*Jogendra Nath Chaudri and Ghulam Mujtaba*, for the appellant.

*Muhammad Ishaq*, for the respondents.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C.J.—This appeal arises under the following circumstances. The defendant Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan on the 4th of August, 1905, instituted a suit against her husband for the recovery of her dower, and on the 24th of November, 1905, obtained a decree. On the 2nd of August, 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first court dismissed the suit, but upon appeal the learned District Judge reversed the decision of the court below and decreed the plaintiff's claim.

The main question which has been discussed before us is whether or not the learned District Judge rightly laid the burden of proof on the defendant Musammat Nannhi Jan. According to his judgment he found, in agreement with the court below, that the oral evidence was valueless, and held that the decision of the case turned on the amount of value to be placed upon the deed of sale in favour of Musammat Bhuri. Then he says: "The burden of proof was upon the defendant-respondent Musammat Nannhi Jan to prove that the deed had been executed fictitiously and collusively. She did absolutely nothing to satisfy this burden." And later on he observes:—"Musammat Nannhi Jan having absolutely failed to discharge

the burden of proof on her to show that the sale-deed was executed fraudulently, fictitiously and collusively, I find that the deed of sale in question is a genuine document." It is contended that the learned District Judge regarded the case from an entirely wrong stand-point and that the trial of the case was wholly unsatisfactory. The important fact to bear in mind is that Musammat Bhuri filed an objection to the attachment and to the sale of the property which had been transferred to her and that her objection had been disallowed. In consequence of this it was necessary for her to institute the suit. It appears to us to be well settled, so far at all events as this Court is concerned that a plaintiff coming into Court under such circumstances is bound to lay before the Court some evidence to satisfy the Court that the document under which she claims represents a *bona fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. The learned District Judge appears to us to have laid the burden of proof upon the wrong party. In the case of *Tulshi Rai v. Ram Das* <sup>(1)</sup> Straight and Tyrrell, JJ., held that under similar circumstances the burden rested upon the plaintiffs who were impeaching the disallowance of their objection filed in the execution department to establish by clear and satisfactory proof that the property attached was their property at the date of the attachment and not the property of the judgment-debtor. This decision was followed in *Afzal Begam v. Muhammad Obaidat-ullah Khan* <sup>(2)</sup>, and also in the case of *Ram Nath v. Bindraban* <sup>(3)</sup>. It also has the support of the case of *Govind Atmaram v. Santai* <sup>(4)</sup>, which is a case on all fours with the case before us. In that case Sargent, C. J. observes :—" The defendant had obtained an order maintaining his attachment, and it was incumbent upon the plaintiff who impugns that order by the present suit to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money and that she had been since in possession." These cases establish the proposition that a party intervening, as the plaintiff did in this case, in the execution department and failing in his

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Stanley, C. J.

(1) [1887] A. W. N., 71.

(2) [1899] A. W. N., 220.

(3) [1896] I. L. R., 18 All., 369.

(4) [1887] I. L. R., 12 Bom., 270.

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Stanley, C. J.

objections to an attachment and consequently being obliged to bring a suit under section 283 must give *prima facie* evidence to establish the genuineness of the document upon which he relies. One case was quoted to us in which a different view was taken. That was the case of *Suba Bibi v. Balgobind Das* (1). In that case Straight and Brodhurst, JJ., laid the burden upon the defendant. This decision loses weight from the fact that in the later case Straight, J., resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath v. Bindrabai*, which we have cited. Now the learned District Judge has considered the evidence from an entirely wrong standpoint, and it is impossible for us to accept his conclusion on the question whether the sale to the plaintiff was a real transaction or not, in view of the course adopted at the trial. We therefore, as was done in *Govind Atma'am v. Santai*, set aside the decree and remand the case to the lower appellate court for re-trial. We accordingly remand the case with directions that it be replaced in the file of pending appeals in its proper number and be disposed of on the merits, regard being had to the directions which we have given above. The costs here and hitherto will abide the event.

*Appeal decreed, cause remanded.*

(1) [1886] I. L. R., 8 All., 178

CIVIL.

1908.

March 14.

RICHARDS, J.

KHAIRATI

versus

BANNI BEGAM.\*

*Transfer of Property Act (IV of 1882), section 85—Parties adverse claimants, whether may be joined—Suit for sale.*

Adverse claimants ought not to be made parties to a mortgage suit for the purpose of litigating their titles, and that the only proper parties to such a suit are persons interested in the equity of redemption. *Jaggewar Dutt, v. Bhuvan Mohan Mitra*, I. L. R., 33 Cal., 425, followed.

SECOND APPEAL against the decree of the Subordinate Judge of Moradabad, confirming a decree of the Munsif.

Suit for declaration of right.

\* S. A. No. 23 of 1907.

The material facts appear from the judgment.

The Courts below decreed the suit.

Defendant appealed.

*Gokul Prasad* (for whom *Jang Bahadur Lal*), for the appellant.

The respondent was not represented.

The following judgment was delivered by

RICHARDS, J.—Khairati, defendant in the present suit, brought a suit on the 29th August, 1904, upon foot of a mortgage, dated the 10th December, 1895, whereby Intizam Begam mortgaged the property, the subject matter of the present suit, to him. He only made his mortgagor Intizam Begam a defendant to the suit. A decree was obtained, but when Khairati applied for execution, the property was claimed by Banni Begam, the mother-in-law of Intizam Begam. The present suit was then instituted by Banni Begam, under the provisions of section 283 of the Code of Civil Procedure. The courts below have decided the suit in favour of Banni Begam on the simple ground that Khairati knew that Banni Begam claimed that Intizam Begam was *benamidar* for her, and that he was bound to make her a party to the suit, he brought on foot of his mortgage. I have only to consider whether the lower courts were justified in decreeing Banni Begam's suit without coming to any finding whether or not the property was really the property of the plaintiff, or on any other issue arising in the case. Section 85 of the Transfer of Property Act provides that in a mortgage suit, all persons having an interest in the property comprised in the mortgage must be made parties. In the present suit, no doubt, Khairati knew that Banni Begam claimed the property. Her claim, however, was adverse to both mortgagor and mortgagee. Khairati could not admit her claim. To do so would be fatal to his mortgage and the suit on foot thereof.

In the case of *Jaggewar Dutt v. Bhuban Mohan Mitra* <sup>(1)</sup>, it was held that adverse claimants ought not to be made parties to a mortgage suit for the purpose of litigating their titles, and that the only proper parties to such a suit are persons interested in the equity of redemption. In a carefully considered

(1) [1906] I. L. R., 33 Cal., 425

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KHAIRATI

v.

BANNI BEGAM.

*Richards, J.*

CIVIL.

1908.

KHAIRATI

v.

BANNI BEGAM.

*Richards, J.*

judgment, Mookerjee, J. gives many cogent reasons for such a proposition. In the present appeal, it is unnecessary for me to decide that Khairati's suit would have been bad had he joined Banni Begam as a party, but the courts below have held that his suit was bad because he did not join her as a defendant.

I certainly agree with the learned Judges who decided the case I have cited that as a general rule, it would be highly inconvenient to allow adverse titles paramount to that of the mortgagor and mortgagee to be litigated in a mortgage suit. To do so would cause the greatest confusion. Section 45 of the Code of Civil Procedure provides that when causes of action are joined which the Court considers cannot be conveniently tried or disposed of together, it may order separate trials or make any other order that may be necessary or expedient. Possibly this enactment is sufficient, and a suit is not actually bad because an adverse claimant is made a party. I am, however, clearly of opinion that the suit of Khairati on his mortgage was not bad because he did not make Banni Begam a defendant, and this is the only matter necessary for decision in the present appeal. No one appears on behalf of the respondent.

I allow the appeal, set aside the decrees of both the courts below, and remand the case under section 562 of the Code of Civil Procedure to the court of first instance through the lower appellate court with directions to re-admit the suit under its original number in the register, and dispose of it according to law. The costs will be dealt with by the court finally disposing of the case.

*Appeal allowed, cause remanded.*

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## KHIALI RAM

*versus*

## HIMMATA AND OTHERS.\*

CIVIL.

1908.

March, 12.

KNOX J.

*Indian Registration Act (III of 1877), sections 47, 50—Sale of property subject to an unregistered mortgage—Notice of mortgage served after execution of sale-deed but before registration—purchaser whether bound.*

Where property is sold which had a previous unregistered mortgage existing in respect of it, the registration of the mortgage not being compulsory, and notice of the mortgage is served on the vendee after the sale-deed is executed but before it is registered, the purchaser is bound by the mortgage. *Diwan Singh v. Jadho Singh*, I. L. R., 19 All., 145, and *Bhikki Rai, v. Udit Narain Singh*, I. L. R. 25 All., 366, applied.

SECOND APPEAL against the decree of the Subordinate Judge of Meerut confirming a decree of the Munsif.

Suit for sale upon a mortgage.

The material facts appear from the judgment.

The courts below dismissed the suit.

Plaintiff appealed.

*Gulzari Lal*, for the appellant.

*Surendra Nath Sen*, for the respondents.

The following judgment was delivered by

KNOX, J.—This second appeal arises out of a suit brought by Khiali Ram. Khiali Ram is a holder of an unregistered mortgage-deed, dated the 27th of January, 1895. The deed was one the registration of which was not compulsory under the Indian Registration Act. He sued the obligors of the deed to recover the money due under his deed and in default to bring to sale the property hypothecated in the deed. He also added to the suit as a party one Bhoja, who had purchased the same property under a sale-deed, dated the 8th of February, 1905, but not registered until the 7th of April, 1905. The court of first instance dismissed the claim and the lower appellate court on appeal arrived at the same finding. It held that

*Knox, J.*

\* S A. No. 3 of 1907.



CIVIL.

1908.

KHALI RAM  
v.  
HIMMATA.

Knox, J.

there was no evidence to show that the respondent Bhoja had any knowledge of the plaintiff's mortgage on the date of the sale, but it further found that a notice was served on Bhoja after the execution of the sale-deed, but before its registration. The lower appellate court observed further that as there was no evidence to show that the respondent Bhoja had notice on the date he got the sale-deed executed, he was not bound to pay the amount of the mortgage. In appeal, it is contended before me that the respondent Bhoja having received notice of the plaintiff's mortgage before registration of the sale-deed in his favour the said respondent is bound by the same.

The learned vakil for the respondents takes his stand upon the provisions contained in sections 47 and 50 of the Indian Registration Act, and he cites in support of his position the principle laid down in *Hasha v. Ragho Ambo Gondhali* <sup>(1)</sup>. He further drew attention to the case of *Santaya Mangarsaya v. Narayan* <sup>(2)</sup>, likewise to the case of *Abdul Majid v. Muhammad Faizullah* <sup>(3)</sup>, and *Baldeo Prasad v. Baldeo* <sup>(4)</sup>. None of these cases cited are exactly in point or on all fours with the present case.

On the other hand the principle laid down by my brother Aikman in *Diwan Singh v. Jadho Singh* <sup>(5)</sup>, which was afterwards re-stated and affirmed in *Bhikhi Rai v. Udit Narain Singh* <sup>(6)</sup>, is a principle which can without difficulty be extended to the circumstances of the present case. It is true that in neither of these cases the facts are exactly the same as the facts in the present case, but the principle that section 50 of the Indian Registration Act will not avail to the holder of a subsequently registered deed over an earlier deed not compulsorily registrable, if the holder of the registered deed at the time of the registration had notice of the earlier unregistered deed, is one, as I have already said, which can easily be extended to and covers the position of the parties in the case before me. At the time when Bhoja was informed by letter of the plaintiff's mortgage, he had ample time to reconsider

(1) [1881] I. L. R., 6 Bom., 165. (2) [1883] I. L. R., 8 Bom., 182.

(3) [1890] I. L. R., 13 All., 89. (4) [1901], A. W. N., 112.

(5) [1896] I. L. R., 19 All., 145. (6) [1903] I. L. R., 25 All., 366.

his position and to refuse to register the deed. He had notice of the previous transaction sufficient to put him on inquiry, and could have ascertained whether in taking the sale-deed he was or was not taking it subject to the incumbrance of 1895. The plea taken in appeal prevails. The appeal is decreed, the decrees of the courts below are set aside, and as this decision is upon a preliminary point, upon which the courts below have erred, the case will be returned to the court below under section 562 of the Code of Civil Procedure with directions to re-admit it on its file of pending cases and dispose of it according to law. Costs here and hitherto will abide the event.

*Appeal decreed, cause remanded.*

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RAMDHANI SAHU

*versus*

LALIT SINGH AND OTHERS.\*

*Instalment bond—Whole amount payable upon failure to pay any instalment—Suit to recover balance—Instalments paid irregularly—Waiver—Interest from date of decree.*

A bond payable by instalments provided that on failure to pay any instalment, the obligee would be entitled to get the whole amount of the bond together with interest at 12 per cent *per mensem* from the date of the bond. Some of the instalments were paid though irregularly and accepted. There was default again. In a suit to recover the balance due upon the bond with interest : *Held*, that the plaintiff was entitled to recover the amount sued for with interest from the date of the decree.

*Sakhawat Husain v. Gajadhar Prasad*, I. L. R., 28 All., 622, distinguished.

SECOND APPEAL against the decree of Munshi Banke Behari Lal, Subordinate Judge of Gorakhpur, confirming a decree of Babu Jogendra Nath Chaudhari Munsif of Basti.

Suit for sale upon a mortgage.

The material facts appear from the judgment.

The courts below decreed the suit in part.

\* S. A. No. 961 of 1907.

CIVIL.

1908.

KHIALI RAM  
*v.*  
HIMMATA.

*Knox, J.*

CIVIL

1908.

*July, 23.*

STANLEY, C. J.  
BANERJI, J.

CIVIL.

1908.

RAMDHANI SAHU

v.

LALIT SINGH.

*Banerji, J.*

Plaintiff appealed.

*Girdhari Lal Agarwala*, for the appellant.*Haribans Sahai*, for the respondents.

The judgment of the Court was delivered by

BANERJI, J.—This appeal arises in a suit brought by the plaintiff appellant to recover money due upon a mortgage bond, dated Magh Sudi 13, 1304 Fasli, corresponding to the 15th of February, 1897. The amount secured by the bond was Rs. 600, and it was agreed that the said amount should be paid by instalments, the last instalment being payable on *Baisakh Sudi* 15th, 1324. It has been found that up to the 8th instalment payments were made by the mortgagors but irregularly. It has further been found that default was made in payment of the 9th instalment, and that the 10th instalment had become due before the date of the suit. By reason of this default, the plaintiff claimed the balance of the principal amount due under the bond as also interest. The bond provides that if the obligors of it fail to pay any instalment, then the whole amount of the bond would be payable at once with interest at 12 annas per cent *per mensem* from the date of the bond. We may observe that if instalments were regularly paid, no interest was payable under the terms of the bond.

The court of first instance held that the plaintiff had waived the defaults made by the mortgagors, and was therefore entitled only to the balance due upon the 9th and 10th instalments, and not to the remainder of the money secured by the bond. It made a decree for Rs. 37-9-6, being Rs. 31 for principal, and Rs. 6-9-6 interest. This decree has been affirmed by the lower appellate Court.

The plaintiff appeals and it is contended on his behalf that he is entitled to the remainder of the amount due under the bond and to interest at the rate of 9 per cent *per annum* from the date of the decree of the court of first instance. He relies on the condition of the bond to which we have referred above, namely, that in case of default in the payment of any instalment, the whole amount of the bond shall become payable. In our judgment, this contention must prevail. It may be that by reason of his receiving the instalments which had

become overdue, although paid irregularly, the plaintiff may be deemed to have waived the benefit which the bond conferred on him in case of default in the payment of those instalments, but as the bond gives him the right to recover the whole of the balance due upon failure to pay any instalment, the plaintiff became entitled upon default being made in the payment of the 9th instalment, to sue for whatever amount remained due to him under the bond, that is, to all amounts payable on account of the 9th and all subsequent instalments. The courts below have relied upon the judgment in *Sakhawat Husain v. Gajadhar Prasad* <sup>(1)</sup>. That case is clearly distinguishable from the present. In that case as in the present, some instalments though paid irregularly had been received but the suit was brought after all the instalments had become due and the only question was whether the plaintiff was entitled to interest in accordance with the terms of the bond, such interest being payable in case of default being made in the payment of any instalment. It was held that the creditor having received the amounts of the instalments which had been irregularly paid was not entitled to interest on those amounts. A decree, however, was made with interest for the amount of the remaining instalments, the interest being calculated from the date of last default. That is not the case in the present instance. In this suit, as we have pointed out, the plaintiff does not claim anything on account of the instalments, the amounts of which have already been received by him. He says that the fact of a fresh default being made entitled him to sue for the whole amount of balance due and casts no obligation upon him to receive that amount by instalments. We think that he is so entitled. In the court below he abandoned that portion of his claim in which he had prayed for interest on the balance from the date of the bond, and only asked for interest from the date of the court's decree. As to this prayer there cannot be any objection. He valued his appeal in the court below at Rs. 332-8-0, and that is the value of this appeal in this Court also. To this amount he is in our judgment clearly entitled. We accordingly allow the appeal, and vary the decree of the court of first instance to the extent that we increase the amount decreed from Rs. 37-9-6

(1) [1906] I. L. R., 28 All., 622.

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1908.

RAMDHANI SAHU

v.

LALIT SINGH.

*Banerji, J.*

CIVIL.

1908.

RAMDHANI SAHU

v

LALIT SINGH.

*Banerji, J.*

to Rs. 332-8-0 with interest thereon at 9 *per cent per annum* from the date of the decree of the court of first instance to the date of payment. We extend the date of payment of the Rs. 270, on account of prior mortgage to the 5th of November, 1908, and the date of payment by the defendants other than the prior mortgagee to the 15th of December, 1908. The appellant will have his costs in this Court and in the lower appellate court but not in the court of first instance. In other respects, the decree of the court of first instance is maintained.

*Appeal allowed.*

CIVIL.

1908.

*July, 17.*STANLEY, C. J.,  
BANERJI, J.

ATWARI

*versus*

MAIKU.\*

*Code of Civil Procedure (Act XIV of 1882), sections 223, 617—Decree passed by a Court of Small Causes—Attachment and sale of immoveable property—Decree sent for execution to Munsiff—Appeal.*

A decree passed by a Court of Small Causes sought to attach and sell immoveable property and was, therefore, sent for execution to the Munsiff's Court under section 223, Code of Civil Procedure. Application having been made for execution in the Munsiff's Court, the judgment-debtor raised certain objections which were overruled.

*Held*, that the appeal lay, to the District Judge neither the suit nor the execution proceedings having been transferred to the Munsiff's Court, but the decree was sent under section 223, of the Code. Had the suit or the execution proceedings been transferred to the Munsiff's Court under section 25 of the Code or the execution proceedings instituted in the Munsiff's Court under section 35, Provincial Small Cause Courts Act, the proceedings held in the Munsiff's Court might be regarded as proceedings held by a Court of Small Causes.

Reference by Mohammad Ishaq Khan Esq., District Judge of Farrukhabad, under section 617 of the Code of Civil Procedure.

The material facts appear from the judgment.

The parties were not represented.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—This is a reference by the learned District Judge of Farrukhabad, under section 617 of the Code of Civil

\* Mis. No. 203 of 1908.

Procedure. The facts are these. A decree was made by a Court of Small Causes in a suit cognizable by that court. As the decree-holder sought to realise the amount of the decree by attachment and sale of immoveable property, the Court of Small Causes sent the decree to the Munsif's Court for execution, under the provisions of section 223 of the Code of Civil Procedure, the application for execution was accordingly made in the Munsif's Court, objections were raised on behalf of the judgment-debtor. Those objections having been overruled, the judgment-debtor appealed to the District Judge in his court. The question was raised whether an appeal lay from the order of the Munsif. It was contended before him that as the suit was of the nature cognizable in a Court of Small Causes, the proceedings in execution taken in the Munsif's Court should be deemed to be proceedings in a Small Cause Court suit and were therefore final. The fallacy which underlies this contention is that in the present case the suit was not transferred to the Munsif nor were execution proceedings, pending in the Small Cause Court, transferred to the Munsif's Court but the decree was sent under section, 223 of the Code as immoveable property was sought to be sold. Had the suit or the execution proceedings been transferred to the Munsif's Court under section 25 of the Code of Civil Procedure, or had the execution proceedings been instituted in the Munsif's Court under section 35 of the Provincial Small Cause Courts Act, the proceedings in the Munsif's Court might be regarded as proceedings held by a Court of Small Causes. But this was not so. The Court of Small Causes had no jurisdiction to sell immoveable property, and for this reason the decree was sent to the Munsif's Court, in order that execution proceedings might be held in that Court. The order passed by the Munsif was an order which he might have passed in a suit instituted in his court. From such an order, an appeal ordinarily lay to the District Judge, and therefore in the present case the appeal preferred in the Court of the District Judge could in our judgment be entertained. Section 27 of the Small Cause Courts Act has no application to a case of this kind. This is our answer to the reference.

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1908.

ATWARI

v.

MAIKU.

*Ranerji, J.**Record returned.*

CIVIL.

1908.

July 17.

STANLEY, C. J.  
BANERJI, J.

## RAM CHARAN AND OTHERS

versus

## RAM PARTAB.\*

*Specific Relief Act (Act I of 1877), section 42—Possession—Suit for declaration of title—Application for partition in Revenue Court—Objection—Land Revenue Act (Act III of 1901), sections 111, 233 (k).*

The plaintiffs who were lambardars objected, under section 111 of the Land Revenue Act, to an application for partition made by the defendant, alleging that the latter had no share in the zamindari, and they were required to institute a suit in the Civil Court. Accordingly the present suit for declaration was brought.

*Held*, that the plaintiffs being admittedly in possession as lambardars, all that was needed was a declaration to the effect that the defendant had no title, and such a declaration having been made by the Civil Court, it would not be necessary for the plaintiffs to seek any further relief. The suit, therefore, was not barred under the provisions of section 42, Specific Relief Act.

*Held* also, that section 233 (k), Land Revenue Act, did not apply to the case as it was provided for by section 111 of that Act, and the decision of the Civil Court referred to in the latter section meant the "final decision" of that court.

SECOND APPEAL against the decree of L. Marshall Esq., District Judge of Mainpuri, confirming a decree of Babu Ishri Parshad, Subordinate Judge.

Suit for a declaration of right to certain property.

The material facts appear from the judgment.

*M. L. Agarwala*, for the appellants.

*Sital Prasad Ghosh* (with him *Gobind Prasad*), for the respondent.

The judgment of the Court was delivered by

BANERJI, J.—This appeal arises in a suit brought by the plaintiffs appellants under the following circumstances. The respondent made an application in the Revenue Court for partition of a fourth share in certain zamindari. On notice being issued to the co-sharers in accordance with the provisions of section 110 of the Land Revenue Act, No. III of 1901, the

\* S. A. No. 915 of 1907.

present plaintiffs preferred an objection alleging that the respondent had no share, and that he was not entitled to ask for partition. A question of proprietary title having been thus raised the Revenue Court in the exercise of its powers under section 111 of the Act, made an order requiring the plaintiffs to institute a suit in the Civil Court for the determination of the question of proprietary title. Accordingly the present suit was brought for a declaration that the respondent has no right of ownership to the five biswas zamindari share claimed by him, and that the plaintiffs are owners of the aforesaid share. The suit was dismissed by the court of first instance on the ground that it offended against the provisions of section 42 of the Specific Relief Act, and this decision has been affirmed by the lower appellate court. In our judgment, the courts below are wrong in holding that the plaintiff's suit is barred by the provisions of section 42 of the Specific Relief Act. Under section 111 of the Land Revenue Act, a party is required by the Revenue Court to bring a suit in the Civil Court for the determination of the question of proprietary title which has been raised in partition proceedings. It is this question of proprietary title which the plaintiffs seek to have determined by the Civil Court, and were bound to ask the Civil Court to declare. In the present case the plaintiffs are admittedly in possession as lambardars. All that was needed was that a declaration should be made to the effect that the respondent had no title. If such a declaration is made by the Civil Court, it will not be necessary for the plaintiffs to seek any further relief, and they would be entitled to withhold payment of a share of profits to the respondents. This in our judgment is not a case to which section 42 applies. The learned vakil for the respondent contends that as a partition has already taken place, section 233(k) of the Land Revenue Act precludes us from dealing with the appeal. This contention is in our judgment untenable. Section 233 provides that no person shall institute a suit or other proceedings in the Civil Court with respect to the matters referred to in clause (k) except as provided in sections 111 and 112. This is a case which is provided for by section 111, and therefore clause (k) has no application to it. The decision of the Civil Court referred to in section 111 undoubtedly means the final decision of the Civil Court.

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For these reasons we allow the appeal, discharge the decrees of both the courts below, and remand the suit to the court of first instance through the lower appellate court under the provisions of section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register, and dispose of it according to law. The appellant will have his costs of this appeal, including fees on the higher scale. Other costs will follow the event.

*Appeal allowed, cause remanded.*

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1908.

*July, 31.*

STANLEY, C. J.

BANERJI, J.

MUJIB-ULLAH

*versus*

UMED BIBI.\*

*Limitation Act (XV of 1877), art. 179—Application in continuation of previous application.*

Certain property was attached in execution of a decree and was ordered to be sold. On the date fixed for sale the bidders did not come and the sale was not held. The decree-holder was required to pay certain fees for fresh sale notification. The court ordered that the case may be struck off "for the present." About two years after the date of sale and more than three years after the date of the application the decree-holder applied that the property which could not be sold for want of bidders may be sold. *Held* that the application was an application in continuation of the previous application and the decree was not barred by limitation. By using the words 'for the present' the court intended to keep the execution proceedings in abeyance. *Dhaki Ram v. Jogendra*, 5 C. W. N., 347 distinguished. *Rahim Khan v. Phul Chand*, I. L. R., 18 All., 482 referred to.

*Held* further that having regard to rule 388 of the rules of 4th April, 1898, no fee should have been levied for further sale notification.

APPEAL under section 10 of the Letters Patent against the order of AIKMAN, J. confirming a decree of the District Judge of Gorakhpur.

The facts appear from the Judgment of

*Aikman, J.*

AIKMAN, J.—This appeal arises out of an application to execute a decree for money passed upwards of a quarter of

\* L. P. A. 9 of 1908.

a century ago. As the learned District Judge remarks, the case "illustrates in a remarkable manner the protracted nature of proceedings in execution of a decree in those cases where the judgment-debtor is not anxious to pay off the amount decreed." The decree was passed on the 14th May 1880. Various applications were made for execution, and some portion of the decretal amount was realized. On the 30th of June 1899 the decree-holder presented an application to realize the balance due under the decree by attachment and sale of certain immovable property. The judgment-debtor pleaded that the application was barred under the provisions of section 230 of the Code of Civil Procedure. The court of first instance overruled the objection, but on appeal the District Judge sustained it. The decree-holder appealed to this Court, which on the 20th of June 1902 reversed the order of the lower appellate court and restored that of the court of first instance, treating the then application as one in continuation of the previous application, which was within time, but which had proved abortive owing to the institution of a suit to set aside a sale. This Court accordingly remanded the case under the provisions of section 562 of the Code of Civil Procedure, to the court executing the decree. When the order of this Court was received in the court below, the application of the 30th June 1899 was restored to its original number in the register and a date fixed for the sale of the property. The sale did not come off on the date fixed owing to objections filed by the judgment-debtor as to the amount due under the decree. These objections were finally disposed of on the 10th of September 1903. On the 7th December 1903 the court ordered the sale of the property which had been attached to recover the amount found to be due from the judgment-debtor. On the 30th of January 1904 the Amin reported that he had been unable to hold the sale as there were no bidders. On the 1st of February 1904 intimation of this was ordered to be given to the decree-holder. On the 3rd February 1904 the court recorded an order to the effect that, notwithstanding intimation, the decree-holder had not proceeded with the case or paid in fresh process fees for proclamation of a second sale, or deposited the costs of the Amin, and ordered the decree-holder

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to pay the necessary fees by the 10th of February, stating in its order that no further time would be allowed. On the 10th February the court recorded an order to the effect that, no fees having been paid, it appeared that the decree-holder did not wish to proceed with the case, which was accordingly ordered to be struck off "for the present," costs being awarded against the decree-holder. The decree-holder took no further steps until the 13th of January 1906, when he put in an application asking that the property which, it appears, was still under attachment and which had not been sold previously owing to the absence of bidders, might now be sold. Objection was taken by the judgment-debtor on the ground that the application was a fresh application and was beyond time. This objection was overruled by the learned Subordinate Judge, who held that it was not a fresh application but merely one to revive the preceding application. On appeal the learned District Judge took the same view, holding that the present application was merely in continuation of the former. The judgment-debtor comes here in second appeal. The case has been well argued by the learned vakil who appears to support the appeal, but after considering the authorities cited by him I see no ground for differing from the conclusion arrived at by the courts below. On behalf of the appellant reliance is placed on the decision in *Dhukiram Srimani v. Jogendra Chandra Sen* <sup>(1)</sup> the facts of which are somewhat similar to those of the present case. There is this material distinction, however, that in the case relied on the application under consideration was made upwards of four years after the previous application. Here there was no doubt considerable delay on the decree-holder's part and if he had taken no steps for three years I should have held the application to be barred. The respondent here had obtained an order for the sale of certain property. That order was not carried out, but this was for no fault of the decree-holder. He now asks that the previous order for the sale of the property, which is still under attachment, should be carried out. I think therefore that the present application must be deemed to be in continuation of the previous application. This view seems to me supported by what was said in the Full Bench case of *Rahim Ali Khan*

(1) [1900] 5 C. W. N., 347.

v. *Phul Chand* <sup>(1)</sup> and the observations of the Privy Council in *Raja Muhesh Narain Singh v. Kishanund Misr* <sup>(2)</sup> at page 337 of the judgment. For these reasons I am of opinion that the appeal fails, and I dismiss it with costs.

Judgment-debtor appealed.

*Satish Chandra Banerji*, for the appellant.

*Sital Prasad Ghose* (for *Mohammed Ishaq*), for the respondent.

The following judgments were delivered.

STANLEY, C. J.—The question in this appeal is whether an application for execution made on the 13th of January, 1906, is barred by the provisions of section 230 of the Code of Civil Procedure. Both the lower courts, as also a learned Judge of this Court, have held that it is not so barred. The circumstances of the case are somewhat peculiar. It is an order of the 10th of February, 1904, upon which the real question in my opinion turns. It appears that an application for execution was made by the decree-holder, and the property was attached and directed to be sold. A proclamation for sale was issued, but the sale proved abortive owing to the absence of bidders. Thereupon the decree-holder was required to pay amin's fees and also the fees for a further sale notification. It seems to me that this was not a proper order in view of Rule 388 of the Rules of Court of the 4th April 1894. That rule provides, amongst other things, that no fee shall be chargeable for serving or executing any process issued a second time in consequence of an adjournment made otherwise than at the instance of a party. Now the adjournment in this case was not at the instance of the decree-holder. It was rendered necessary by the fact that no bidders attended at the sale, and therefore, in the absence of authority to the contrary, I should be prepared to hold that the court was not justified in requiring the decree-holder to pay further fees. The decree-holder did not pay further fees within the time fixed, notwithstanding that several opportunities were given him for the purpose of making such payment. In consequence of his default the order of the 10th of February, 1904, was passed. By that order, after stating that the decree-holder had not deposited

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auCTION fees in spite of demands, it was directed that the execution case should be for the present struck off the list of pending cases, the decree-holder to pay the costs of execution. It seems to me upon the language of this order that it amounted to nothing more than a direction that the proceedings should remain in abeyance for the time being. It was not a final order disposing of the execution application. If this was not so, the words 'for the present' would be meaningless. In this view, it appears to me that the case is not similar to that of *Dhukiram Srinani v. Jogindra Chandra Sen* <sup>(1)</sup>, which has been relied upon by Dr. Satish Chandra Benerji, in which it was held that a subsequent application was not a continuation of a previous application for execution "inasmuch as there was a clear break in the continuity by reason of the decree-holder's omission to deposit the costs for service of a fresh sale proclamation, and thereby the previous proceeding came to an end." Here the previous proceeding did not come to an end, but was kept in abeyance. It appears to me that the case more nearly resembles that of *Rahim Ali Khan v. Phul Chand* <sup>(2)</sup>. For these reasons, I think that the application of the 13th of January, 1906, was a proper application and was rightly granted. For these reasons I would dismiss the appeal.

Banerji, J.

BANERJI, J.—I also would dismiss the appeal. The decree in this case was passed on the 20th of May, 1880. The application made on the 13th of January, 1906, would, therefore, be barred under the provisions of section 230 of the Code of Civil Procedure, if it could be treated as an application for execution within the meaning of that section. A previous application for execution had been made within 12 years from the date of the decree, and if the proceedings which took place in pursuance of that application were not determined by reason of the court dismissing the application, the present application might properly be regarded as an application in continuation of the previous application. The question whether the present application is a fresh application for execution turns on the meaning, and effect of the order of the 10th of February, 1904, by which the proceedings in execution under the previous application were terminated. That order directs

(1) [1900] 5 C. W. N., 347.

(2) [1896] I. L. R., 18 All., 482

the execution case to be removed from the list of pending cases "for the present." The court must have used the words "for the present" with some purpose. It did not order the property which had been attached to be released from attachment. The use, therefore, of the words "for the present," seems to indicate that what the court intended was only to keep the execution proceedings in abeyance to be renewed again. Under these circumstances, the application of the 13th of January, 1906, may be reasonably assumed to be an application for the revival of the proceedings which had been kept in abeyance by the order of the 10th of February, 1904. In the Full Bench case of *Rahim Khan v. Phul Chand*<sup>(1)</sup>, it was held that a subsequent application will not necessarily be deemed to be a fresh application for execution, if by reason of objections on the part of the judgment-debtors or action taken by the court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution could not be obtained. In the present instance, it seems, the decree-holder was not bound, having regard to Rule 388 of the Rules of the 4th of April, 1894, to pay fresh fees for the issue of a proclamation of sale a second time. There was, therefore, no default on his part, and the proceedings were not terminated in consequence of his omission to do something which he was bound to do. That, in my opinion, is another reason why the subsequent application of the 13th of January, 1906, should not be treated as a fresh application for execution. It should be held to be, as it purported to be an application in continuation of the previous application for, execution. For these reasons, I agree with the learned Judge of this Court from whose judgment this appeal has been preferred in holding that the application for execution is not barred.

BY THE COURT.—The order of the court is that the appeal be dismissed with costs.

*Appeal dismissed.*

(1, [1896] I. L. R., 18 All., 482

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July, 14.

AIKMAN, J.  
GRIFFIN, J.

SAFIA BEGAM

versus

SHIAM PRASAD.\*

*Limitation Act (XV of 1877) article 179—Application for sale of other property also dismissed—Third application to sell the property the sale of which was asked for in the first application—Whether could be treated as in continuation.*

Decree-holder obtained a decree for sale of several properties against the representatives of I. He put the decree in execution on the 7th August, 1900, against the village B which had come on partition between the heirs of I to S and which was mentioned in the order absolute as liable to be sold. S objected on the ground that she had paid the proportionate share of the decretal amount. The application was dismissed. Thereupon, on the 20th January, 1902, the decree-holder applied for sale of another village in possession of the other set of heirs of I. They objected and their property was released on the ground that the village B ought to be sold first. The decree-holder applied for sale of B on 9th February, 1907. *Held* that the execution of the decree was barred by limitation and the decree-holder could not get the benefit of intervening proceedings against the second set of I's heirs. The application could not be treated as an application in continuation of the application to sell the other village in possession of the second set of heirs as S had no interest in that. Further it could not be treated as an application made in continuation of the application of 1900 as that application had been dismissed. *Thakur Prasad v. Abdul Husan*, I. L. R., 23 All., 13, referred to.

APPEAL against the order of Moulvi Muhammad Shafi, Subordinate Judge of Aligarh.

Application for execution of decree.

The material facts appear from the judgment.

*Abdul Raoof* (with him *J. N. Chaudri*), for the appellant.

*Jang Bahadur Lal* (with him *Durga Charam Banerji*), for the respondent.

The judgment of the Court was delivered by

Griffin, J.

GRIFFIN, J.—The respondent's predecessors in interest obtained on the 31st July, 1896, a decree under section 88 of the Transfer of Property Act, against the heirs of one Inayet-ullah Khan on a mortgage executed by him.

\* E. F. A. No. 334 of 1907.

Before the suit, there had been a general partition among the heirs of Inayetullah Khan, whereby different items of the mortgaged property were allotted to different heirs. In this way Mauza Bahadurpur was assigned to the appellant Safia Begam, and Mauza Abhepur Behlolpur was given to Musammat Fakhrunnisa, a daughter of Inayetullah..

The decree under section 88 of the Transfer of Property Act made no distinction between the liabilities of the different judgment-debtors or the liabilities of the various properties.

The decree-holders applied for an order absolute in terms of the decree under section 88. Notice was served on the various judgment-debtors. Objections were preferred by several of them on the grounds that they had paid into court various sums in satisfaction of their proportionate share of what they alleged to be of the decree and professed their willingness to pay any further sum due by them, in respect of their proportionate share, and asked that the properties might be exempted from the order absolute under section 89, Transfer of Property Act.

Upon these objections, the court passed an order that the decree-holders should take out of court the amounts deposited by the objecting judgment-debtors, and that for the balance due under the decree such part of the mortgaged property as was not in the possession of the objectors should first be sold, and that for any balance left, the property of the objectors might be sold. In terms of this order, a decree was drawn up. By a mistake of the office, in the order absolute as originally framed, two villages, which were in the possession of the objectors, were ordered to be sold first. As this was not in accord with the judgment, the court on application being made thereto amended the order absolute under section 206, Code of Civil Procedure.

In that order absolute as amended, the only property which was ordered to be sold first, was Mauza Bahadurpur, which as said above is the property of the appellant, Safia Begam. After an abortive application for execution which was dismissed on the 12th July, 1899, the decree-holders on the 7th August, 1900, asked that Bahadurpur should be sold. Safia Begam objected arguing that her property was under

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the Court of Wards, and that the Collector had paid Rs. 14500, on account of her proportionate share of the judgment-debt, and asked that her property should not be sold. On the 28th June, 1901, he, the Subordinate Judge, held that Safia Begam's property was not exempted from sale, but, ignoring the terms of the order absolute, he took it upon himself to order that the property of the other judgment-debtors should be sold first, and that any balance remaining due should be recovered from Safia Begam's property. He accordingly rejected the application for execution of sale of Bahadurpur. This was an order we need scarcely say which the Subordinate Judge had no authority to pass. The decree-holders however submitted to it.

Their next application was one of the 20th January, 1902. In this the decree-holders asked for the sale of Abhepur Behlolpur. The heirs of Musammat Fakhrunnisa, to whom this village had fallen, objected that under the terms of the order absolute, Safia Begam's property should be sold first. On the 5th July, 1902, the same Subordinate Judge refused the application to sell Abhepur, and ordered that the property in Safia Begam's possession should be proceeded against. This latter portion of his order was not embodied in the formal order. The decree-holders submitted to this order. But Safia Begam appealed to this Court. Her appeal was disposed of on the 16th of May, 1904. This Court held that the Subordinate Judge had no right, on the application of the decree-holders to sell one property, to order that another property belonging to a different judgment-debtor should be sold especially as that order had been passed in Safia's absence. But as the order in regard to Safia's property had not been embodied in the formal order, and was therefore inoperative, her appeal was dismissed. The decree-holders then waited until 9th February, 1907, when they put in the application out of which this appeal arises asking that Bahadurpur should be sold. On behalf of Safia Begam, two objections were raised, (1) that the application was barred by limitation, and (2) that the order of 28th June, 1901, operated as *res judicata*, and that under that order the properties of the other judgment-debtors must be proceeded against, before her property could be sold. The court below disallowed both

these objections, and she has preferred this appeal. The first plea which is taken is that the application is barred by time. The application on the face of it is beyond time, being made upwards of five years after the last preceeding application. It is urged on the part of the respondents that owing to the proceedings referred to above, certain obstacles were thrown in the way of the decree-holders, and until those obstacles were removed they could not go on with the execution. The court below has got over the difficulty of limitation by treating this as an application in continuance of the application of 20th January, 1902. We do not think that it can be so regarded. The application of 20th January, 1902, was to sell Abhepur, a property in which the appellant had no interest. The present application is to sell Bahadurpur which is the appellant's property. This application might be deemed to be an application in continuance of the application of 7th August, 1900, which was one to sell the appellant's village of Bahadurpur. That application was dismissed, and the decree-holders allowed the order of dismissal to become final. Even if the order of 28th June, 1901, did not stand in the decree-holder's way, there was nothing to prevent him when the Subordinate Judge on the 5th of July, 1902, directed him to proceed against the property of the appellant from acting in accordance with that direction and applying to sell the property. Instead of doing so, he waited until 1907 before he took any further steps against the appellant. In our opinion, the decree-holders have acted with the greatest dilatoriness, and are not entitled to take advantage of the intervening proceedings as extending the period of limitation prescribed by article 179, schedule II of the Limitation Act [*vide* what was said in *Thakur Prasad v. Abdul Hasan*,<sup>(1)</sup>]. We sustain the first plea in the memorandum of appeal and hold that the present application is barred by limitation. The appeal is allowed, and the order of the court below is set aside. The appellant will have her costs here and in the court below. Costs in this Court will include fees on the higher scale.

<sup>(1)</sup>[1900] I. L. R., 23 All., 13.

*Appeal allowed.*

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July, 24.

STANLEY, C. J.  
BANERJI, J.

## LALTA PRASAD

versus

## SALIG RAM AND ANOTHER.\*

*Will, construction of—Persona designata—Reason and motive of gift—  
‘Adopted son’—Description.*

Where a Hindu testator bequeathed his property to “Lalta Prasad my adopted son,” *held*, in the absence of anything in the will to show that the fact of the adoption of the devisee was the motive or the reason for the gift, that the language of the gift was to be interpreted in its ordinary meaning as a gift to Lalta Prasad as a *persona designata*, who was entitled to take under it even though the adoption was not proved. *Nidhoomoni v. Saroda Pershad*, L. R., 3 I. A., 253, followed.

SECOND APPEAL against the decree of Pandit Girraj Kishore Datt, Subordinate Judge of Bareilly, reversing a decree of Babu Rama Das, Munsif of Pilibhit.

Suit for possession of property.

Question of construction of will. The will was in these terms :

“Whereas I Kedar Nath...own as mine, property, moveable and immoveable, self-acquired and ancestral, of the value of Rs. 2,500, and am in possession thereof up to the present time without the participation of anybody, I make a will in respect of the whole of the said property while in full possession of my senses and health, without compulsion or coercion, and out of my own accord, as follows :

(a) I the executant shall be during my life the owner and possessor of the same and all my rights and powers, such as they are at present, shall continue as heretofore ; (b) after my death my wife Jamna Dei shall be like myself the owner (*malik*) and possessor of the whole property, and she shall have all powers such as those of transfer, gift, disposition (*tasarruf*) *et cetera* of every kind ; (c) after the death of the said lady, Lalta Prasad my adopted son shall be absolute owner and possessor of everything left by me and Musammat Jamna Dei aforesaid. Wherefore I have executed this will.”

\* S. A. No. 971 of 1907.

Jamna Dei pre-deceased Kedar Nath. Upon Kedar Nath's death his sister's sons took possession of part of the property. Lalta Prasad thereupon brought this suit to recover possession of the property. The first court decreed the suit, but the lower appellate court found that the plaintiff had failed to prove his adoption and dismissed the claim. The Subordinate Judge relied upon the following authorities :

*Fanindra Deb v. Rajeswar Das*, [1885] I. L. R., 11 Cal., 463, P. C.

*Abbu v. Kuppanmal*, [1892] I. L. R., 16 Mad., 355.

*Surendro Roy v. Doorgasoondry*, [1892] I. L. R., 19 Cal., 513, P. C.

*Karsandas v. Ladka Nahu*, [1887] I. L. R., 12 Bom., 185.

*Rango Balaji v. Mudiyeppa*, [1898] I. L. R., 23 Bom., 296.

Plaintiff appealed.

S. C. Banerji, for the appellant, submitted that the plaintiff was entitled to take as *persona designata* irrespective of the question whether he was or was not an adopted son.

*Nidhoomoni v. Sarodu Pershad*, [1876] L. R., 3 I. A., 253, 257.

*Subbarayar v. Subbama*, [1900] I. L. R., 24 Mad., 214, P. C.

*Lali v. Murlidhar*, [1906] I. L. R., 28 All., 488, P. C.

Gulsari Lal, for the respondent, relied upon the last case and on

*Fanindra Deb v. Rajeswar Das*, [1885] I. L. R., 11 Cal. 463, P. C.

The judgment of the Court was delivered by

STANLEY, C. J.—The meaning of a gift in the will of one Kedar Nath is the only question in this appeal. Kedar Nath made a will on the 22nd of June, 1888. The will is very simple in its character. By it he gave to his wife all his property for her life and after her death he declared that Lalta Prasad, his adopted son, should be the *malik* or owner of the property. The testator's wife pre-deceased him. He died on the 3rd of September, 1904, and upon his death, the defendants, who are his sister's sons, took possession of his property. Thereupon the suit out of which this appeal has arisen was instituted by Lalta Prasad. He claimed the property under the gift contained in the will of Kedar Nath. The court of first instance held that he was entitled to it as *designata persona* under the will, and that it was immaterial to find whether or not he was the adopted son of Kedar Nath. It did, how-

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ever, consider that question and came to the conclusion that the adoption was proved. On appeal, the lower appellate court held that the will was genuine but that the adoption of the plaintiff was not proved, and it reversed the decision of the court below on the ground that the gift made to the plaintiff was so made to him not as a *persona designata* but as an adopted son, and that inasmuch as he had failed to prove his adoption, the gift failed and he therefore dismissed the plaintiff's suit. The construction of the will appears to us to be extremely simple. After the death of the widow, the testator gave his property to Lalta Prasad by name and then described him as an adopted son. There is absolutely nothing in the will to show that the fact of the adoption of the plaintiff was the motive or reason for the gift, and in the absence of anything of the kind, it appears to us that interpreting the language of the gift in its ordinary meaning, we must treat it as a gift to Lalta Prasad as a *persona designata*, and that therefore the gift is valid. This case appears to us to resemble the case of *Nidhoononi Debya* and *Saroda Pershad Mookerjee* (1), and to be governed by the decision in that case. We therefore allow the appeal. We set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs in all courts.

*Appeal allowed.*

[Cf. *Sri Raja Rao Venkata Surya Mahipati Rama Krishna v. The Court of Wards*, [1899] 1 L. R., 22 Mad., 383, P. C.—ED.]

B.

(1) [1876] 1 L. R., 3 I. A., 253.

## RAM KALI

*versus*

## JAMNA AND ANOTHER.\*

*Agra Tenancy Act (II of 1901), section 22—Male lineal descendant—  
Illegitimate son of a Sudra.*

An illegitimate son of a sudra by a continuous concubine is entitled, in the absence of a legitimate son, to the occupancy holding of his father as a male lineal descendant. *Inderun v. Ramaswamy*, 13 M. I. A., 14; *Sarusti v. Mannu* I. L. R., 2 All., 134; *Hurgobind v. Dharum Singh*, I. L. R., 6 All., 329, referred to.

SECOND APPEAL against the decree of W. F. Kirton Esq. Additional Judge of Moradabad, confirming a decree of Babu Kunwar Sen, Munsiff of Chandausi.

Suit for declaration.

The facts were as follows :—

One Mahtab Singh was the occupancy tenant of certain fields. His father was a Thakur but his mother was a *Kahar* woman. Musammat Jamna was the concubine of Mahtab Singh, and by her he had a son, Ghansham Singh. On the death of Mahtab Singh, Musammat Jamna and Ghansham Singh applied in the Revenue Court for the entry of their names in respect of the occupancy holding of Mahtab Singh. The Revenue Court refused their application. Thereupon they brought the present suit for a declaration that Musammat Jamna was the wife and Ghansham Singh the son of Mahtab Singh and as such they were entitled to succeed to the occupancy holding. The courts below decreed the suit.

Defendant appealed.

*Isvar Saran* (with him *M. M. Malaviya*), for the appellant.

*Beni Madho Ghosh* (for *Durga Charan Singh*), for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—The question in this second appeal is whether the plaintiff respondent Ghansham Singh who is

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August, 4.

STANLEY, C. J.  
BANERJI, J.

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\* S. A., No. 355 of 1907.

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RAM KALI

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Stanley, C. J.

the illegitimate and only son of one Mahtab Singh deceased by a concubine, who had lived continuously with Mhatab Singh. is entitled to the occupancy holding of his father as a male lineal descendant within the meaning of that expression as used in section 22 of the Agra Tenancy Act. The courts below have rightly held that Mahtab Singh belonged to the *Sudra* caste.

Both the lower courts held that the plaintiff was so entitled. We think that this decision is right. In *Inderun Valingypooly Taber v. Talaber* <sup>(1)</sup>, their Lordships of the Privy Council held that the illegitimate children of the *Sudra* caste, in default of legitimate children, inherit their putative father's estate. In *Sarasuti v. Mannu* <sup>(2)</sup>, PEARSON, AND OLDFIELD, JJ., held that illegitimate offspring of a kept woman or continuous concubine amongst *Sudras* are on the same level as to inheritance as the issue of a female slave by a *Sudra* and that the illegitimate son of an Ahir by a continuous concubine of the same caste took his father's estate in preference to the daughter of a legitimate son of his father, who died in the father's life-time. In *Hargobind Kuari v. Dharam Singh*, <sup>(3)</sup>, STRAIGHT, O. C. J., and DUTHOIT, J., held that according to Hindu Law and usage illegitimate sons are entitled to maintenance from their father and his estate is liable for such payment. Hindu Law differs from the English Law in so far that it does not treat an illegitimate son as *filius unclius*. His status as a son in the family is recognised and his right to maintenance secured to him.

On the foregoing authorities therefore we think that it was rightly held in the courts below that the plaintiff Ghansham Singh is entitled in the absence of a legitimate son to the occupancy holding of his father as male lineal descendant. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

(1) [1870] 13 M. I. A., 141.

(2) [1879] I. L. R., 2 All., 134.

(3) [1884] I. L. R., 6 All., 329.

## RAM CHANDER

*versus*

## KALLU AND OTHERS.\*

*Transfer of Property Act (IV of 1882) section 91 (a), 92—Reversioner's right to redeem in the lifetime of widow—Interest, meaning of.*

CIVIL

1908.

July, 24.  
STANLEY C. J.,  
BANERJI, J.,

A reversionary heir cannot get a decree for redemption of property mortgaged by the deceased husband of a Hindu widow during the life-time of the widow in possession of the estate. The provisions of section 92, Transfer of Property Act, do not apply to a person who is a reversionary heir and may never become entitled to the property sought to be redeemed.

The *interest* referred to in section 91 (a) of the Transfer of Property Act is a *present* interest and not a mere *contingent* right such as a reversioner possesses.

SECOND APPEAL against the decree of J. H. Cuming Esq., Additional Judge of Aligarh, affirming a decree of Munshi Ganga Prasad, Munsif of Khurja.

Suit for redemption.

The material facts appear from the judgment.

The courts below decreed the suit.

Defendant appealed.

*Muhammad Raoof*, for the appellant.

*Girdhari Lal Agarwala*, for the respondents.

The judgment of the Court was delivered by

STANLEY, C. J.—The question raised in this appeal is whether persons who claimed to be reversionary heirs of a deceased mortgagor can during the life-time of the mortgagor's widow redeem a mortgage executed by the deceased. Diwan Singh was the mortgagor and he executed the mortgage in question in favour of one Durga. His widow Musammat Ram Dei is now in possession of the property. Ram Chandar the defendant appellant is a purchaser from Durga. No authority is shown for the proposition that a reversionary heir, who may or may not, according to the circumstances, ever come into possession of an estate is entitled to redeem. The plaintiffs

*Stanley, C. J.*

\*S. A. No. 486 of 1907.



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1908.

RAM CHANDER

v.

KALLU.

*Stanley, C. J.*

have no present interest in the property. Their interest is contingent upon their surviving the mortgagor's widow. The court of first instance gave a decree for redemption and directed that on payment of the mortgage debt, the plaintiffs should be put into possession. Now it is obvious that the plaintiffs have no right to possession in the life-time of the mortgagor's widow. Therefore this provision in the decree is clearly wrong. Upon appeal the learned District Judge affirmed the decision of the court below with the modification that he directed that the provision in the decree awarding possession to the plaintiffs should be struck out. Notwithstanding this direction, we find in the decree the same provision for possession. In it, is stated that in the event of payment of the mortgage debt by the plaintiffs, they shall be put into possession of the mortgaged property. On turning to section 92 of the Transfer of Property Act, it is obvious that the provisions of that section cannot be complied with, if the suit is one by reversionary heirs, as is the case here, seeing that they are not entitled to possession of the mortgaged property, and may never be so entitled. That section also provides that if payment is not made of the mortgage debt in accordance with the earlier provision of the section, the plaintiff is to be absolutely debarred of all right to redeem the property, or that the property be sold. This provision would be inapplicable to the case of plaintiffs who are only reversionary heirs, and who may ultimately never become entitled to the property. It would not be binding upon other parties who upon the death of the widow would become actually entitled to it as heirs. The plaintiffs respondents rely upon the language of section 91 (a) as giving them a right to redeem. This section provides that any person (other than the mortgagee of the interest sought to be redeemed) "having any interest in or charge upon the property" may redeem, and the contention is that the plaintiffs respondents have such an interest. We think that the interest there referred to is a present interest and not a mere contingent right such as the plaintiffs possess. In view of the difficulty of carrying out a decree for redemption in a case of the kind, particularly in cases in which persons are entitled to an interest in the property for life in succession, as for instance, the widow of a deceased mortgagor and after

her, the daughter of such mortgagor, we do not see our way to extend the meaning of the word 'interest' as used in this section so as to embrace the chance of inheriting of a reversionary heir. It seems to us that possibly this suit was instituted by the plaintiffs with a view to obtain an equitable charge or lien upon the property which would enable them in future proceedings to sell the property, or in some way to deprive the widow of her life-estate. For these reasons we allow the appeal, we set aside the decrees of both the lower courts and dismiss the suit with costs in all courts.

*Appeal allowed.*

SRIDHAR RAO

*versus*

RAM LAL.\*

*Civil Procedure Code (Act XIV of 1882), section 440—Minor—Suit by next friend—Notice to certificated guardian—No formal order granting leave to next friend to sue—Presumption.*

*A* as next friend of *B*, a minor, instituted a suit to have a sale-deed executed by *C*, the certificated guardian of *B*, set aside. Notice was issued to *C* under section 440, Civil Procedure Code, but he showed no cause. No formal order granting leave to *A* to institute the suit was recorded, but the court proceeded to frame issues, and examine witnesses. *Held*, that it must be presumed that the court did grant leave to the person who presented the plaint, after being satisfied that, it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf, and the court below was wrong in dismissing the suit on the ground that leave to institute the suit had not been formally granted and recorded.

FIRST APPEAL against the decree of H. E. Holme Esq., C. S., District Judge of Jhansi.

Suit for cancellation of a sale deed.

The material facts will appear from the following extract from the judgment of the lower court :—

\* F. A. No. 28 of 1907.

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1908.

RAM CHANDER  
*v.*  
KALLU.

*Stanley, C. J.*

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1908.

*August, 5.*

STANLEY, C. J.  
BANERJI, J.

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1908.

SRIDHAR RAO

v.

RAM LAL.

This is a suit in which one Sridhar Rao, a minor, claims the cancellation of decree on a mortgage-deed standing in his name, and a declaration that no one but himself has any interest in the said mortgage-deed. It appears that Sridhar Rao is the illegitimate son of one "Raja" Madho Rao, who took out a certificate of guardianship in respect of the said Sridhar Rao, and under this certificate sold the mortgage-deed now in suit to the defendant Ram Lal. Sridhar Rao, now seeks to impeach the sale to Ram Lal on the ground of fraud and want of consideration. Issues have been framed, and the taking of evidence has been completed, but defendant now urges that the suit must fail as having been instituted in violation of the provisions of section 440, Civil Procedure Code. This plea must succeed. The provisions of section 440, are imperative [see *Bachchu Singh v. Secretary of State* (1), regarding the analogous section 424], and they have not been complied with in this case. It is admitted that Sridhar Rao is a minor, and that he has a guardian (Raja Madho Rao) appointed under Act VIII of 1890. This suit was not instituted "with the leave of the court *granted after notice* to such guardian." It was instituted (section 48, Civil Procedure Code) by the presentation of the plaint on 22nd March, 1906. On the same date, an application by the minor (in contravention of section 441, Civil Procedure Code) was put in asking that one Sada Sheo Rao (the person who signed the plaint) might be appointed next friend of the minor. Notice was sent to Raja Madho Rao calling on him to prefer any objection he might have, not "with respect to the institution of the suit" as required by section 440, Civil Procedure Code, but to the appointment of next friend. This notice was not before the court (of the learned Subordinate Judge, from which court this case was afterwards transferred under section 25, Civil Procedure Code.) till 13th June, more than a month before which date *i. e.* on 11th May, defendant had already filed his written statement in the suit.

On behalf of the plaintiff, I have been referred to the cases of *Hanuman Prasad v. Muhammad Ishaq* (2), also *Walian v. Banke Behari* (3), *Hira Lal v. Bhairon* (4), and *Dhunput v.*

(1) [1902] I. L. R., 25 All., 187.

(2) [1905] I. L. R., 28 All., 137.

(3) [1903] I. L. R., 30 Cal., 1021.

(4) [1883] I. L. R., 5 All., 602.

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*Paresh* (1). But in so far as these cases have any relevancy, they are readily distinguishable. I have also been referred by plaintiff to *Sham Krishna v. Ram Das* (2). It is there laid down that where some only of the plaintiffs are minors, and the suit has not, as far as they are concerned, been instituted in accordance with the provisions of section 440, Civil Procedure Code, the defect can be afterwards cured. But from the judgment of their lordships in that case, it appears that this is only so where some of the plaintiffs are properly represented, and that only with reference to section 34, Civil Procedure Code. I need only quote the words. Section 440.....precludes any other person than the guardian.....from instituting a suit except.....after due notice.....to such guardian..... This being so.....the suit was not properly instituted on behalf of the minor plaintiffs. This did not, however, entail the dismissal of the suit so brought." (The words "as brought" are important). "There was from the beginning before the court, one plaintiff who was *sui juris*, and further no objection was taken.....If the respondent wished to raise the objection..... section 34 expressly provides that any such objection not so taken (*i. e.*, before the first hearing) shall be deemed to have been waived."

The defendant has referred me to the case of *Jagmant v. Silan* (3) in case it were contended that he was estopped from raising the plea of contravention of section 440, Civil Procedure Code, at this stage of the suit.

In accordance with the above, I dismiss this suit with costs.

Plaintiff appealed.

*J. N. Chaudri* (with him *Harendra Krishna Mukerjee*) for the appellant.

*Sundar Lal* (with him *S. C. Banerji*), for the respondent.

The judgment of the Court was delivered by

BANERJI, J.—The suit which has given rise to this appeal was brought on behalf of a minor for the avoidance of a sale-deed executed by his certificated guardian. The plaint in the suit was filed by a person who described himself as the next friend of the plaintiff. As he was not the certificated guardian, the court ordered notice to issue to the certificated

*Banerji, J.*

(1) [1893] I. L. R., 21 Cal., 180.

(2) [1897] I. L. R., 20 All., 162. (3) [1899] A. W. N., 66.

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RAM LAL.

*Banerji, J.*

guardian as required by section 440. This order was passed on an application made by the next friend who instituted the suit on behalf of the minor. Notice was served on the certificated guardian but he showed no cause. The court then proceeded to settle issues, and recorded some evidence but no formal order was recorded granting leave to the new next friend to institute the suit. The case was transferred to the court of the learned District Judge, and before him an objection was taken to the effect that as no leave had been granted under section 440, the suit was not maintainable. This objection prevailed in the court below, and the suit has been dismissed. The learned judge was of opinion that leave to institute the suit ought to have been formally granted and recorded. Section 440 requires that if a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian except with the leave of the court granted after notice to such guardian. As we have said above, notice was issued to the certificated guardian as required by the section; it was served on him but he did not appear and show cause. It is true that no formal order granting leave was recorded by the court but as the court framed the issue and examined witnesses, it must be presumed that the court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf. The court below was therefore wrong in dismissing the suit. As the suit was dismissed upon a preliminary ground, and in our opinion that ground cannot be supported, we set aside the decree of the court below, and remand the case to that court under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register, and dispose of it on the merits. The appellants will have the costs of this appeal, including fees on the higher scale. Other costs will abide the event.

*Appeal allowed, cause remanded.*

## AKBAR KHAN AND ANOTHER

*versus*

## TURABAN.\*

*Limitation Act XV of 1877, sch. II, art. 120—Declaration—Cause of action—Denial of title.*

CIVIL.

1908.

August, 13.

STANLEY, C. J.  
BANERJI, J.

Where the defendant's name was entered in the revenue papers in 1895, and the plaintiffs in 1903 applied for correction of those papers, when the defendant again asserted his title, *held*, the plaintiffs' cause of action for a declaratory suit arose in 1895, and there was no fresh cause of action in 1903 and the refusal to have the entry corrected was a continuation of the original cause of action.

Where the plaintiff is in possession and asks for a declaratory decree, the limitation applicable to the suit is that prescribed by art. 120, sch. II, Limitation Act, and should be computed from the date on which his cause of action arose. *Legge v. Ram Baran Singh*, I. L. R., 20 All, 35, F. B., followed. *Elahi Bukhsh v. Harnam Singh*, 18 A. W. N., 215 ; *Skinner v. Shanker Lal*, (unreported) distinguished.

SECOND APPEAL from the decree of C. Badhwar Esq., Additional Judge of Meerut reversing a decree of Babu Ram Chandra, first Additional Munsif.

Suit for declaration of title.

Plaintiffs claimed to be in proprietary possession of immovable property. In 1895 the defendant got her name recorded as proprietor of this property in the revenue registers. Plaintiffs applied in 1903, to the Revenue Court to have this entry corrected. Defendant, claiming title in himself, opposed this application, which was rejected. Whereupon the plaintiffs brought this suit. The lower court dismissed the suit as barred by time.

Plaintiffs appealed.

*Ghulam Mujtaba*, for the appellants, argued that the denial by defendant of plaintiffs' title in 1903 had given the latter a fresh cause of action and the suit was within time from that date. Plaintiffs were not bound to rush into court when their title was denied for the first time in 1895.

\* S. A. 1114 of 1907.

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AKBAR KHAN  
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TURABAN.*Elahi Bukhsh v. Harnam Singh*, [1898] 18 A. W. N., 215.*Skinner v. Shanker Lal*, S. A. No. 263 of 1907, decided on May 27, 1908.\**Abdul Raoof*, for the respondent, was not called upon, but referred to*Legge v. Ram Baran Singh*, [1897] 1. L. R., 20 All., 35, F. B.

The judgment of the Court was delivered by

*Banerji, J.*

BANERJI, J.—The question in this appeal is whether the plaintiffs' claim is barred by limitation. The suit is one for a declaratory decree. The plaintiffs asked for a declaration that they were entitled to the property mentioned in the plaint. In 1895 the name of the defendant was entered in the revenue papers in respect of this property and the title of the plaintiffs was denied. The lower appellate court has held that the plaintiffs' cause of action for a declaratory suit accrued when this entry was made in 1895 and, as held by the

\* KNOX AND AIKMAN, JJ.—The respondent in this second appeal got his name entered in the *khewat* in spite of appellant's objections by order of the Settlement Officer on the 5th of May, 1899. On the strength of this entry the respondent on the 5th of May, 1903, instituted a suit for profits of the share in respect of which he had got his name entered. On the 27th of July, 1905, while the suit for profits was yet pending plaintiffs brought the suit out of which this appeal has arisen for a declaration of their right to the share and that the defendant had no proprietary right in the share recorded in his name. The suit has been dismissed by the court of first instance as barred by limitation. In appeal the decree of the first court was affirmed. The plaintiff comes here in second appeal.

The court's below reckoned as the starting point the order of the Settlement Officer referred to above. No doubt the plaintiffs might upon this order being made have instituted a suit for a declaratory decree but in our opinion they were not bound to do so. The defendant might have taken no steps to enforce any right under the order of the 5th of May, 1899, but when he did so plaintiffs in our opinion got a fresh cause of action for asking for a declaratory decree. The suit now brought is in reality one within the last paragraph of section 201 of the Agra Tenancy Act. We allow this appeal set aside the decree on the preliminary point and remand the case under the provisions of section 562 of the Code of Civil Procedure through the lower appellate court to the court of first instance with directions to readmit it under its original number in the register of pending suits and dispose of it on the merits. The plaintiffs will have the cost of this appeal including fees on higher scale. Other costs to abide the result.

Full Bench in *Legge v. Ram Baran Singh* <sup>(1)</sup>, six years' limitation applies to the suit and must be computed from the year 1895. We think this view of the court below is right. According to the Full Bench ruling referred to above where the plaintiff is in possession and asks for a declaratory decree the limitation applicable to the suit is that prescribed by article 120 of schedule II to the Limitation Act, and should be computed from the date on which his cause of action arose. In the present case the plaintiffs' cause of action is the entry of the defendant's name in the revenue papers in respect of the property in suit in 1895. As the suit was brought after the expiry of six years from that year, it is time-barred. It is contended on behalf of the appellants that a fresh cause of action accrued to them in 1903 when the defendant objected to the correction of the *khewat*. That in our opinion was not a fresh cause of action. The refusal to have the entry corrected was a continuation of the original cause of action, namely, the entry of the defendant's name in the revenue papers in 1895. In the case of *Elahi Bukhsh v. Harnam Singh* <sup>(2)</sup>, and in S. A. No. 263 of 1907 (unreported) *Robert Skinner v. Shanker Lal* <sup>(3)</sup>, decided by a Bench of this Court on the 27th of May, 1908, there was a fresh invasion of the plaintiff's right, and that was held to have given him a fresh cause of action. As in the present case there was no fresh invasion of the right of the plaintiffs, the rulings referred to are inapplicable. We accordingly dismiss the appeal with costs, including fees on the higher scale.

*Decree affirmed.*

(1) [1897] I. L. R., 20 All., 35.

(2) [1898] 18 A. W. N., 215.

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1908.

August, 13.

STANLEY, C. J.  
BANERJI, J.

AKBAR KHAN AND ANOTHER

versus

TURABAN.\*

*Specific Relief Act, (1 of 1877), section 42, proviso—One plaintiff out of possession—Other plaintiff in possession in defendant's right—Declaratory suit—Second suit for possession.*

Where out of two plaintiffs to a suit for declaration of title, it appeared that one was not in possession of the property claimed, and the other was in possession but in the right of the defendant who had previously been in possession, *held*, that the suit was barred by the express provisions of section 42, Specific Relief Act, and ought to be dismissed. But the dismissal of this suit would not affect the right of these plaintiffs, if they were entitled to possession, from instituting and maintaining a suit for possession.

SECOND APPEAL from the decree of C. Badhwar Esq., Additional Judge of Meerut, reversing the decree of Babu Ram Chandra first Additional Munsif.

Suit for declaration of title.

The lower appellate court, differing from the first court, found that one out of the two plaintiffs was not in possession of the property in respect of which the declaration was sought, that one of the defendants had been in possession of this property in 1903, and that at the date of suit the other plaintiff was in possession, but that he had entered into such possession in the right of the said defendant, who was his wife, and not by virtue of any personal title. The suit was accordingly dismissed.

Plaintiffs appealed.

*Ghulam Mujtaba*, for the appellants.

*S. Abdul Raoof*, for the respondent.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—In the suit out of which this appeal has arisen the plaintiffs asked for a declaration of their title to certain property which formerly belonged to three brothers, Muhammad Khan, Saadat Khan and Baz Khan. Amongst the

\* S. A. No. 1115 of 1907.

1908.

AKBAR KHAN

v.

TURABAN.

*Stanley, C. J.*

defendants is Musammat Turaban, who is the daughter of Shabaz Khan, a second cousin of the three persons whom we have mentioned. Another defendant is a mortgagee of the property from Musammat Turaban. The court of first instance decreed the plaintiffs' claim, but upon appeal the suit was dismissed on the ground that the defendant Musammat Turaban was in possession of the property and that the suit was obnoxious to section 42 of the Specific Relief Act, and ought to have been dismissed. There is a finding by the learned District Judge that Musammat Turaban was in possession in 1903 and that at the present time her husband, who is one of the plaintiffs, namely, Akbar Khan, is in possession in her right. The other plaintiff Abdul Rahman Khan does not appear to have possession of any portion of the property. In view of this finding the plaintiffs ought in our opinion to have claimed possession. In consequence their suit was barred by the express provisions of section 42 of the Act to which we have referred. The dismissal of their suit will not affect the right of these plaintiffs, if they are entitled to possession from instituting and maintaining a suit for possession. Upon the finding of the learned District Judge that the plaintiffs are not in possession we dismiss the appeal with costs, including fees in this court on the higher scale.

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*Appeal dismissed.*

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1908.

August, 1.

STANLEY, C. J.  
KARAMAT  
HUSAIN, J.

SHOHRAT SINGH

versus

SONKALA KUARI.\*

*Land Revenue Act (III of 1901), section 36—Application for fixing the rent—Certain bond held as obtained by undue influence—Subsequent suit—Whether finding res judicata.*

The zemindar obtained a bond from a tenant in payment of rent at a certain rate for non-occupancy, and ex-proprietary holding. The tenant applied to the Revenue Court, under section 36 of the Land Revenue Act to fix the rent of the holdings. The Assistant Collector held that the bond was obtained by undue influence so far as it related to the ex-proprietary holding and fixed the rent of that holding. In a suit brought by the zemindar for arrears of rent, *held*, that the finding of the Assistant Collector about the bond having been obtained by undue influence did not operate as *res judicata* inasmuch as it was not open to him in an application under section 36 Land Revenue Act to decide that the agreement was void so as to preclude the plaintiff from setting it up in a suit.

SECOND APPEAL against the decree of F. D. Simpson Esq., District Judge of Gorakhpur, confirming a decree of Babu Brij Lal, Assistant Collector of the first class of Basti.

Suit for arrears of rent.

The material facts appear from the judgment.

*Iswar Saran* (with him *Madan Mohan Malaviya*), for the appellants.

*Durgu Charan Banerji*, for the respondents.

The judgment of the Court was delivered by

Stanley, C. J.

STANLEY, C. J.—This appeal arises out of a suit for the rent of two holdings, one being ex-proprietary, and the other non-occupancy. The suit was dismissed in the first court on the ground that a suit for rent for two such holdings did not lie. On appeal the plaintiff was allowed to withdraw his claim, as to the rent of the ex-proprietary holding, and to proceed with it, as to the non-occupancy holding. The plaintiff's case is that the defendants agreed to pay Rs. 10 per bigha for the land, and that an agreement to this effect was executed on

\* S. A. No. 1099 of 1907.

the 1st of November, 1904. As a matter of fact, a bond for Rs. 1907 for rent at that rate was executed by the defendants. An application was made by the defendants to the Revenue Court, under section 36 of the Land Revenue Act, for the fixing of the rent payable for the ex-proprietary holding. In that proceeding, the Assistant Collector was of opinion that the agreement of the 1st of November, 1904, was procured by undue influence, and was therefore void. So far as regards the ex-proprietary holding, he set aside the agreement and fixed the rent at Rs. 3 per bigha, but as we gather from the judgment of the learned District Judge "refused to fix any rent in respect of the other holding, finding the agreement good." The learned District Judge dismissed the plaintiffs' claim on the ground that the finding of the Assistant Collector that the agreement of the 1st of November, 1904, was procured by undue influence, and was void, and that there was no agreement on the part of the defendants to pay any definite rent operated as *res judicata*. We think that the learned District Judge was wrong as to this. Whatever may have been the view of the Assistant Collector as to the validity or otherwise of the agreement, it was not open to him in an application under section 36 of the Land Revenue Act to decide that the agreement was void so as to preclude the plaintiff from setting it up in a suit. The view which he expressed as to the agreement does not operate as *res judicata*. We therefore think that the learned District Judge was wrong in treating the finding of the Assistant Collector as to the agreement as binding upon him. He ought himself to have heard the evidence of the parties and satisfied himself as to whether or not there was a binding agreement for the payment of any specified rent for the non-occupancy holding, and in accordance with his finding have determined the suit. As he has disposed of the case upon a preliminary point we allow the appeal, set aside the decree of the court below, and remand the case under the provisions of section 562 of the Code of Civil Procedure to that court with directions that it be re-admitted on the file of pending appeals and be disposed of on the merits. Costs here and hitherto will abide the event.

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SHOHRAT SINGH  
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Stanley, C. J.

*Appeal decreed, cause remanded.*

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1908.

August, 6.

KNOX, J.  
GRIFFIN, J.

RAM JIWAN

versus

NAWAL SINGH.\*

*Code of Civil Procedure (Act XIV of 1882), sections 521, 591—One plaintiff not joining the reference—Whether a ground to set award aside—Challenged in final decree—Appeal*

Section 521 of the Code of Civil Procedure does not contemplate the setting aside of an award on the ground that all the parties to the suit were not parties to the reference to arbitration. Where therefore one of the defendants, added under section 32, Code of Civil Procedure, and who subsequently withdrew from the suit, did not join the reference which was followed by an award, *held*, that the award could not be set aside.

- A munsif set aside an award on the ground that all the parties to the suit were not parties to the reference and tried and decreed the suit. The defendant challenged the munsif's order setting aside the award in an appeal against the final decree and raised other grounds as well. *Held*, that the ground could be entertained. *Sheonath v. Ram Din*, I. L. R., 18 All., 19; *Sher Singh v. Diwan Singh*, I. L. R., 22 All., 366; *George v. Vastian*, I. L. R., 22 Mad., 202; *Achutayya v. Thimmayya*, 16 Mad. L. J., 228, referred to.

SECOND APPEAL from the decree of Louis Stuart Esq., District Judge of Meerut, confirming the decree of B. Gobind Prasad, Munsif of Ghaziabad.

The plaintiff brought a suit for the partition of a shop and an enclosure. Nanak Chand was also made a defendant under section 32, Civil Procedure Code. Ram Jiwan and Nawal Singh referred the dispute to arbitration and the arbitrator dismissed the suit. On the objection of Nawal Singh, the Munsif set aside the award on the ground that Nanak Chand was not a party to the reference to arbitration, and decreed the plaintiff's claim on the merits. In appeal, the defendant challenged the decree *inter alia* on the ground that the Munsif was wrong in setting aside the award. The District Judge did not record any finding on this ground but dismissed the appeal on the merits.

Defendant appealed.

\* S. A. No. 1282 of 1900.

*Mohan Lal Sandal*, for the appellant, contended that the parties to the appeal having referred the matter in dispute to arbitration, they were bound by the award. As Nanak Chand had no interest in the dispute and subsequently retired from the suit, the award ought to have been confirmed.

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RAMJIWAN  
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*Pitam Mul v. Sadik Ali*, [1902] I. L. R., 24 All., 229.

*Lal Mohan Pai v. Durga Kumar Das*, [1907] 11 C. W. N., 1152.

*Chairman of Purnea Municipality v. Siv Sanker Ram*, [1906] I. L. R., 33 Cal., 899.

*Harendra Krishna Mukerji*, for the respondent submitted that there was no appeal from an order under section 521. The present appeal was mainly directed against the interlocutory order and could not be entertained.

*Sheo Nath Singh v. Ram Din Singh*, [1896] I. L. R., 18 All., 19.

*Sher Singh v. Diwan Singh*, [1900] I. L. R., 22 All., 366.

Nanak Chand being a party to the suit was a necessary party to the order of reference. All the parties must join to make a valid reference. The award which was passed on an invalid reference was no award, and the Munsif could set it aside.

*Mohan Lal Sandal*, in reply distinguished the cases cited by the respondent and cited the following cases :—

*Uman Kuari v. Gobardhan*, [1908] 5 A. L. J. R., 447.

*Nanak Chand v. Ram Narayan*, [1879] I. L. R., 2 All., 181.

*George v. Vastian Soury*, [1899] I. L. R., 22 Mad., 202.

*Achutayya v. N. S. Thimmayya*, [1908] 18 M. L. J., 228.

The judgment of the Court was delivered by

KNOX, J.—The suit out of which this second appeal arises was brought by one Nawal Singh. It was a suit for partition of a shop and enclosure as against the present appellant Ram Jiwan. Later on one Nanak Chand was added as a party by the court acting under section 32 of the Code of Civil Procedure. Nanak Chand filed a written statement. After all, this had taken place on the 18th of August, 1906 Ram Jiwan and Nawal Singh agreed to refer the matter in dispute between them to arbitration. To this reference, Nanak Chand was no party. He subsequently withdrew from the suit. On 29th August, 1906, an award was submitted to the court with this decision

*Knox, J.*

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of the arbitrator that the plaintiff's claim should stand dismissed. An objection was filed on the ground that Nanak Chand was no party to the reference. The court entertained this objection, set aside the award, and ordered that the case should proceed on the merits. Eventually the munsif granted a decree in favour of the plaintiff. The defendant appealed to the Judge, and the Judge dismissed the appeal. He now comes here in second appeal. The first plea in his memorandum of appeal is to the effect that the lower appellate court has erred in not determining the 3rd ground of appeal laid before it, namely, that the court of first instance had in its judgment held that Nanak Chand had no interest left in the suit and that under such circumstances the lower court ought to have dismissed the suit as decided by the arbitrator. We do not think it necessary to go into this point. The grounds for setting aside an award are set forth in section 521 Civil Procedure Code, and it is no ground contained in that section that all the parties to the suit were not parties to the reference to arbitration. This being so, the Munsif was wrong in setting aside the award on a ground not contained in section 521 Code of Civil Procedure. It was contended by the other side that an order setting aside an award is not open to appeal, and that it is too late for the appellant now to attack that order. In support of his contention, the learned vakil referred us to the Full Bench ruling in *Sheonath Singh v. Ram Din Singh* (1), in which it was held that section 591 of the Code of Civil Procedure does not enable an appellant to avoid limitation by coming up under section 591 when the only ground of appeal is an order made under section 562. Section 591 contemplates two things: there being a regular appeal about some thing else, and in that appeal the insertion of a ground of objection under section 591. He also referred us to *Sher Singh v. Diwan Singh* (2), in which it was held that no appeal would lie where the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit. We find however on referring to the memorandum of appeal before us that in the present appeal the grounds were not solely directed against the order setting aside the award. We consider that the

(2) [1900] I. L. R., 22 All, 366.

(1) [1895] I. L. R., 18 All 14.

third ground of appeal was intended to read and may fairly be read as attacking the hearing of the suit by the court after it had set aside the award. This is in harmony with what was held by the High Court in Madras in *George v. Vastian Soury* (\*), and in *Achuthayya v. N. S. Thimmayya*. (4). The result is that this appeal is decreed, the decrees of the courts below are set aside, and the award dated 29 August, 1906, will be made a rule of court. The appellant with get his costs here and in the courts below. Costs here will include fees on the higher scale.

M. L. S.

*Appeal decreed*

(3) [1899] I. L. R., 22 Mad., 202.

(4) [1908] 18 Mad. L. J., 228. S. C. I. L. R., 31 Mad., 345.

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## FULL BENCH.

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### KUBRA JAN

*versus*

### RAM BALI AND ANOTHER.\*

*Multifariousness—Suit for possession of property within and outside jurisdiction of court, Compromised—relief for property within jurisdiction—effect of—cause of action—jurisdiction once vested in court—Act of parties—effect of, on.*

K filed at Bareilly a suit for possession of her share in her father's property situate in Bareilly and Bara Banki, against her brother and his transferees. There were different transferees of the properties situate in the two districts. The claim about Bareilly property was compromised. *Held*, that there was a single cause of action against the brother and his transferees, namely, the infringement of the plaintiff's right by her brother, out of which the claims of the other defendants arose, and the suit was not bad for multifariousness. *Indar Kuar v. Gur Prasad*, I. L. R. 11 All., 33; *Mazhar Ali v. Sajjad Husain*, I. L. R., 24 All., 358; *Parbati Kunwar v. Mahmud Fatima*, I. L. R., 29 All., 267; *Ishan Chander v. Rameswar Mondol*, I. L. R., 24 Cal., 831; *Nando Kunwa v. Banomali*, I. L. R. 29 Cal., 871; referred to. *Ram Raji v. Dhap Narain*, [1885] A. W. N., 125 overruled. *Ganeshi Lal v. Khairati Singh*, I. L. R., 16 All., 279, distinguished.

When once jurisdiction is vested in a court, it will not be taken away by any act of parties. Hence the compromise of the suit about Bareilly property did not take away the jurisdiction of the Bareilly court to adjudicate about Bara Banki property. *Khanja v. Ismail*, I. L. R., 12 Mad., 380 referred to.

\* S. A. No. 941 of 1907.

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SECOND APPEAL against the decree of E. O. E. Leggatt Esq., District Judge of Bareilly, reversing a decree of Pandit Pitambar Joshi, Subordinate Judge.

Suit for possession of property.

The facts appear from the judgment of Stanley C. J.

*Ghulam Mujtaba*, for the appellant, relied on the following cases :—

*Indar Kuar v. Gur Prasad*, [1888] I. L. R., 11 All., 33.

*Mazhar Ali Khan v. Sajjad Husain Khan*, [1902] I. L. R., 24 All., 358.

*Parbati Kunwar v. Mahmud Fatima*, [1908] I. L. R., 29 All., 267.

*Khatija v. Ismail* [1889] I. L. R., 12 Mad, 380

*Harchandur v. Lal Bahadur*, [1894] I. L. R., 16 All., 359.

*Muhammad Ishaq Khan*, (with him *Jang Bahadur Lal*), for the respondent, relied on

*Ram Raji v. Dhup Narain*, [1885] A. W. N., 125.

*Ganeshi Lal v. Khairati Singh*, I. L. R., 16 All., 279.

*Jhandu Mal v. Pirthi*, [1907] A. W. N., 53.

The following judgments were delivered.

*Stanley, C. J.*

STANLEY, C. J.—This appeal has been laid before a Full Bench by reason of a conflict in the authorities upon a question raised in the appeal. The suit is one by the daughter of one Bande Ali, to recover from her brother Akbar Husain and a number of other defendants, transferees from him, her share in the property of her deceased father. This property is situate in the district of Bareilly and also in the district of Bara Banki in Oudh. It appears that Akbar Husain transferred the Bareilly property to the defendants 2 to 8, and the Bara Banki property to persons from whom the defendant respondent Ram Bali acquired it by virtue of a decree for pre-emption. The suit in regard to the Bareilly property was compromised with the result that the claim in respect of that property was abandoned and the suit proceeded as regards the Bara Banki property only.

The first court decreed the suit. But upon appeal, the lower appellate court reversed the decree and dismissed the plaintiff's suit, holding on the authority of the case of *Ram Raji v. Dhup Narain* <sup>(1)</sup>, that the court in Bareilly had no jurisdiction to pass a decree in the suit.

(1) [1885] A. W. N. 125.

From that decree the present appeal has been preferred. The questions in the case are whether the suit is bad for multifariousness, and whether the Subordinate Judge of Bareilly was justified in entertaining it after the compromise of the claim in respect of the Bareilly property.

There appears to be no doubt that under section 19 of the Code of Civil Procedure, the plaintiff was justified in instituting the suit in the Bareilly court, unless it be that the claim was defective for multifariousness. We have therefore first to consider whether or not the suit of the plaintiff was bad for this reason.

The claim of the plaintiff was to recover from her brother her co-heir and transferees from him her share of the property of her father. The cause of action as it appears to me was the withholding of possession of her share and it accrued to her when such possession was withheld. Her brother appropriated the share of the property which belonged to her and any title which his transferees possess is derived from him alone. There were not two causes of action one against her brother, and the other against the transferees of her brother but a single cause of action, namely, the infringement of the plaintiff's right by her brother out of which the claim of the other defendants arose. This view is supported by several authorities and amongst others that of *Indar Kuar v. Gur Prasad* <sup>(2)</sup>. In that case, the plaintiff claimed the property in dispute by right of inheritance from his deceased mother, and impleaded in the suit several defendants, some of whom derived their title as mortgagees from one of the defendants. It was held that inasmuch as the title of the defendant mortgagee was derived from defendant No 1, his mortgagor, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action but one, namely, the infringement of the plaintiff's right by the defendant No 1, and that the suit was not bad for misjoinder of causes of action. In the case of *Mazahar Ali Khan v. Sajjad Husain Khan* <sup>(3)</sup>, Mazahar Ali Khan came into court claiming a portion of the inheritance of a deceased Mahomedan on the allegation that he had by two separate

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(2) [1888] I. L. R., 11 All., 33. (3) [1902] I. L. R., 24 All., 358.

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sale deeds, of two different dates, purchased the property from two of the heirs of the deceased, and that the property was withheld from him by another heir of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. It was held by my brothers BANERJI and AIKMAN that there was no misjoinder of parties or causes of action in such a suit. A similar question was considered by another Bench of this Court of which I was a member, in the case of *Parbati Kunwar v. Mahmud Fatima* (4). In that case, the plaintiffs sued as heirs of their father to recover various portions of their father's estate from the hands of different alienees. It was held that the fact that the defendants set up different titles to the various portions held by them would not render the suit bad for multifariousness. The plaintiffs had one cause of action, namely, the right on the death of their father to obtain possession of their shares of his property. In coming to that conclusion we had the support of the rulings to which I have alluded, and also of two decisions of the Calcutta High Court, passages out of which were quoted in the judgment. These cases are *Ishin Chander Hissra v. Rameswar Mondol* (5), and *Nando Kunwar Nasker v. Banomali Gayan* (6). In the first of these two cases, it was held by O' KINEALY and HILL, JJ., that in a suit for ejectment against several defendants who set up various titles to different parts of the land claimed, there was only one cause of action, not several distinct and separate causes of action. In the other case the defence that the suit was bad for multifariousness was set up, the allegation of the defendants being that they were severally in possession of different and distinct portions of the land in dispute under different demises made by the first defendant, and that there was no community of interest. I quote portion of the judgment in the other case which appears to me to be apposite. In delivering their judgment, HILL, and BRETT, JJ., observed: "The cause of action of a plaintiff suing in ejectment cannot, so far as we can perceive, be affected by the title under which the defendant professes to hold possession.

(4) [1908] I. L. R., 29 All., 267.

(5) [1897] I. L. R., 24 Cal., 831. (6) [1902] I. L. R., 29 Cal., 871 at 880.

It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him, and that fact gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments, and we think that all persons, who oppose him in the enforcement of that right, are concerned in his cause of action and ought accordingly to be made parties to a suit in which he seeks to give effect to it." I agree in these observations, and they seem to me to be applicable to the case before us. The plaintiff is claiming her share of her father's property, She finds her brother and transferees from her brother in possession. She is not under such circumstances obliged to bring independant actions against her brother, and each of the transferees but claiming, as she does, title from her father and having as I think only one cause of action she may properly implead all the parties in possession as defendants in one suit.

We have been pressed very much with the decision of a Bench of this High Court in the case of *Ram Raji v. Dhup Narain* (?). In that case under circumstances very similar to those in the case before us *Petheram, C. J.*, and *Brodhurst, J.*, held that a similar suit was not maintainable. In that case, the property which was claimed was situate in the Gorakhpur district and also in Oudh. During the pendency of the suit, there was a compromise in respect of the Gorakhpur property, and in consequence of this the learned District Judge reversing the decision of the Subordinate Judge, held that the Subordinate Judge had acted without jurisdiction in deciding the question between the parties in regard to the property situate in Oudh, on the ground that it was an undeniable misjoinder of causes of action which gave the Subordinate

(7) [1885] A. W. N., 125.

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Judge apparent jurisdiction under section 19 of the Code of Civil Procedure, but that in point of fact he was not competent to entertain that part of the claim which related to the property situate in Oudh. The learned Judges upheld the decision of the District Judge upon the ground stated in the judgment. PETHERAM, C. J., in the course of his judgment says "The learned Judge was of opinion that the court had no jurisdiction to decide the suit, and I think that he was right. When a suit is brought against A in respect of property situate in one district, and against B in respect of property situate in another district, I do not think that the fact that there is a common root to the plaintiff's claim makes a single cause of action upon which he is entitled to bring a single suit. I think therefore that the claim, in respect of the property in Oudh, was properly the subject of a separate suit, and that therefore the provisions of section 16 must be applied, which says that suits are to be instituted in the court within the local limits of whose jurisdiction the property is situate". The learned Judges decided that case therefore on the ground that the plaintiff had not one cause of action only but several causes of action, in respect of the property in the two districts. I am, with all respect, unable to agree with them as to this. I think that the cases to which I have referred were rightly decided, and they conclusively show that there was only one cause of action, and that cause of action was the infringement of the plaintiff's title. I am unable therefore to agree in this decision.

Mr. Ishaq Khan, on behalf of the respondents, also relied upon the case of *Ganeshi Lal v. Khairati Singh* <sup>(1)</sup> as supporting his contention. That was a suit in which the plaintiff claimed to be entitled on the death of a Hindu widow to the possession of certain immoveable property, and brought a suit against three sets of defendants, being persons to whom the widow in her life-time had by separate alienations transferred separate portions of the property claimed. It was held that the suit was bad for multifariousness. It will be at once noticed that this was a suit not against one of the heirs of a deceased person, and the transferees from

(1) [1894] I. L. R., 16 All. 279.

such heir but against three sets of transferees from a Hindu widow. In such a case, the transferees of some of them may have acquired a good title from their transferor, for instance, in the case of a sale to meet a legal necessity, whilst to others of the transferees no such defence might be open. The facts are not identical with the facts in the case before us, though I think the judgment of the learned Judges does lend some support to the argument which has been laid before us.

Again it is said that after the compromise in respect of the Bareilly property, the court ceased to have any jurisdiction to deal with the plaintiff's claim, that is that though the Bareilly court had jurisdiction, when the plaint was filed, to deal with the suit, it ceased to have jurisdiction when portion of the property claimed was withdrawn from the litigation. It seems to me that once jurisdiction is vested in a court, in the absence of a provision of law to the contrary, that jurisdiction will not be taken away by any act of the parties. There is no allegation here that the plaint was filed in the Bareilly court with any intention to defeat the provisions of the Code of Civil Procedure, as regards the venue of suits for recovery of immoveable property. If any fraud of that kind had been alleged and proved, other considerations would arise. But in this case as I have said no such suggestion has been made.

The learned counsel for the respondents has not been able to point out to us any provision of law whereby jurisdiction once vested is taken away in a case of this kind, and I am unable to yield to the contention which has been raised by him. I am supported in this view by the ruling of a Bench of the Madras High Court in the case of *Khatija v. Ismail*<sup>(2)</sup>. MUTTUSAMI AYYAR AND PARKER J J., in their judgment in that case observed "It is not denied that the Subordinate Judge had jurisdiction over the suit when it was filed. As originally framed, it embodied a claim to a share of immoveable property situated partly in Mangalore and partly in Bhatkal. The subsequent withdrawal of the claim, in regard to the property at Mangalore on the ground that there was a compromise entered into with the defendants who had it in their possession, could not, in the absence of a positive rule of law, operate to take away the jurisdiction which had once vested,

(2) [1880] I. L. R., 12 Mad., 380.

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unless the compromise was shown to have been otherwise than *bona fide*, and a mere contrivance to defeat or a fraud upon the policy of the rule of procedure as to local jurisdiction".

For these reasons I would allow the appeal, set aside the decree of the lower appellate court, and remand the appeal to that court for determination on the merits.

BANERJI, J.—I am entirely of the same opinion. The decision of this Court in *Ram Raji v. Dhup Narain* <sup>(1)</sup> no doubt supports the view of the learned Judge but with great respect to the learned Judges of this Court who decided that case I am unable to agree with them. That decision is based on the consideration that the suit offended against the provisions of section 16 of the Code of Civil Procedure. The learned Judges were of opinion that a single suit could not be brought against the different transferees of the property, and that there was a misjoinder of causes of action. For the reasons, stated by the learned Chief Justice, I am unable to hold that there were different causes of action which have been joined together in the same suit. The plaintiff's cause of action was the infringement of her title by a single person, and as the title of the other defendants were derived from the person who infringed the plaintiff's title, there was a single cause of action against the different defendants. This view has been held in the numerous cases to which the learned Chief Justice has referred, and it is unnecessary for me to cite them again. The plaintiff was therefore competent to maintain a single suit both against the transferor and his transferees. Under section 19 of the Code of Civil Procedure, the court in which a part of the property was situate had jurisdiction to entertain the suit. The court at Bareilly in this case had therefore jurisdiction over the suit, and rightly entertained it when it was instituted. The fact that a portion of the claim was withdrawn could not in the absence of fraud oust a Court of its jurisdiction. If the withdrawal was the result of an intention to defeat the provisions of the law, and to confer jurisdiction on a court which would otherwise have no jurisdiction, that would be a different matter. But as in the present case, there is no suggestion of fraud, the mere fact of a portion of

(1) [1885] A. W. N. 125.

the claim being abandoned by a compromise could not in the absence of any statutory provision divest the court of the jurisdiction which was vested in it by law. I am not aware of any such provision, and the learned counsel has referred us to none. For these reasons, I concur in the order proposed by the learned Chief Justice.

GRIFFIN, J.—I concur with the learned Chief Justice in the order proposed by him.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned District Judge be set aside, and the appeal be remanded to him under section 562 Civil Procedure Code, with directions that it be reinstated in the file of pending appeals in its original number, and be disposed of on the merits, regard being had to the observations, which have been made by us in our judgments. We direct that the costs of this appeal and the costs heretofore incurred do abide the event. The costs in this Court will include fees on the higher scale.

*Appeal decreed.*

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*Banerji, J.*

*Griffin, J.*

NARAIN SARAN SINGH

*versus*

SIDH NARAIN SINGH AND ANOTHER.\*

*Pre-emption—Wajib-ul-arz—Sale on 'same price as paid by stranger'—No right inter se among different classes of pre-emptors.*

Where a *wajib-ul-arz* recognised a right of pre-emption 'on the same price as paid by a stranger' (*Shakhs ghair*), though it mentioned different categories of pre-emptors, and gave some of them a preferential right over others, *held*, that the right to pre-empt arose only in the case of a sale to a stranger. *Khatun Bibi v. Sayida Bibi*, I. L. R., 27 All., 456, referred to.

SECOND APPEAL against the decree of C. Rustomji Esq., District Judge of Allahabad, confirming a decree of Babu Prag Das, Subordinate Judge of Allahabad.

Suit for pre-emption on the basis of village custom.

\*S. A. No 900 of 1907.

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*August, 6.*

STANLEY, C. J.  
BANERJI, JJ



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v.  
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There were 17 *wajib-ul-arzes* to be construed. The entries relating to pre-emption were couched in language more or less similar. The following two extracts may be taken as fair samples :—

*Village Chandpur* : " If a person desires to sell or mortgage his property in whole or in part, then upon the same price for which a stranger purchases the right shall be first of the co-sharer who is a near relation, if he does not take, then of the co-shares in the *patti*, and in the event of the latter not purchasing, the right of the co-sharer in the *mahal* shall prevail over a stranger." (*Jo koi shakhs haqiat juz ya kul apni bai ya rehn karna chahe to jis qimat par ghair shakhs kharid kare awal istehqaq sharikdar karabat karib agar woh na le to sharik patti wa dar surat na kharid karne uske, shakhs ghair par haq sharik mahal ka mukaddam hai.*)

*Village Sarai Dadan* : " If any zamindar wishes to sell or mortgage his property in whole or in part, then upon the same price which a stranger pays, the right to purchase is of the co-sharer who bears a near relation, in the event of his refusal, of the co-sharer in the *patti*, and in case he does not take, the co-sharer pattedar in the *mahal*, shall be deemed to be superior."

The plaintiff pre-emptor was a nephew of the vendor (Hindu) and owned shares in the same *pattis* with him. The vendee was a Mahomedan and held no shares in the *pattis* sold, but he was a co-sharer in the several *mahals*. The Courts below held that the vendee was not 'a stranger' within the meaning of the several *wajib-ul-arzes*, and the plaintiff had no cause of action.

Plaintiff appealed.

S. C. Benerji, for the appellant, distinguished

*Khatun Bibi v. Savida Bibi*, [1905] I. L. R., 2. All., 457  
and relied upon

*Ram Lal v. Niadar*, [1907] 4 A. L. J. R., 352.

*Ghulam Mujtaba*, for the respondents, was not heard.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This appeal arises out of a suit for pre-emption brought in respect of a sale of shares in 18 villages. As regards one village Yusufpur, the plaintiff adduced no evidence of the custom on which he based his claim : The claim in

respect of that village has therefore been rightly dismissed. As regards the other villages the plaintiff relies on the *wajib-ul-arzes* of those villages which are more or less in the same terms. The courts below have held that the custom as recorded in those *wajib-ul-arzes* is a custom of pre-emption which arises only upon a sale to a stranger. In the present instance, the vendee is a co-sharer in the village, though not in the same *patti*. The question is whether the courts below have placed a right construction on the *wajib-ul-arzes*. After considering the terms of these documents, we are of opinion that the conclusion at which the learned Judge has arrived is correct. The *wajib-ul-arzes* begin by saying that for such price as a stranger may pay, the persons named in the document may in their order claim pre-emption. In some of these documents, it is stated at the end that the right of the pre-emptors would prevail as against a stranger. The use of the word "stranger" indicates that it was intended that the right of pre-emption would arise only in the case of a sale to a stranger. This case is similar to that of *Khatun Bibi v. Sayida Bibi* <sup>(1)</sup>, on which the courts below have relied. We accordingly dismiss the appeal with costs, including fees on the higher scale.

*Decree confirmed.*

(1) [1905] I. L. R., 27 All., 457.

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v.

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*Ranerji, J.*

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August, 4.

KARAMAT  
HUSAIN, J.  
GRIFFIN, J.

## PACHKAURI RAM AND OTHERS

versus

## NAND RAI AND ANOTHER.\*

*Code of Civil Procedure (Act XIV of 1882), sections 508, 520, second reference—Power of court—Remission of award.*

A reference was made to arbitration. The arbitrator examined the witnesses and made an award after the death of one of the parties and without bringing upon the record the name of his legal representatives. The Munsif "set aside the award and sent back the case to the arbitrators for decision" the legal representative of the deceased party agreeing to the submission. *Held*, that the Munsif had no power to refer the case to a second arbitration as after setting aside the first award, the power of the Munsif to refer was exhausted. Held further that the Munsif could not remit the award under section 520 as no objection to its legality was apparent on the face of it. *Nanak Chand v. Ram Narain*, I. L. R., 2 All. 181; *Perumalla Satyanarayana v. Perumalla Venkata*, I. L. R. 27 Mad., 112, referred to.

FIRST APPEAL from an order of the Subordinate Judge of Ghazipur, reversing a decree of the Munsif.

Suit for possession.

The matter in dispute was referred to arbitration. One of the parties died before witnesses were examined but no steps were taken to substitute his representatives for him. The arbitrator submitted an award which the Munsif set aside, and remitted the case for decision with the consent of the representative of the deceased party. The arbitrator submitted a fresh award. The Munsif passed a decree in accordance with it. The Subordinate Judge set aside the decree and returned the case for trial on the merits.

Plaintiffs appealed.

*M. L. Agarwala*, for the appellants.

*Beni Maaho Ghose*, for the respondents.

The following judgments were delivered.

KARAMAT HUSEIN, J.—The suit out of which this appeal has arisen, was brought for recovery of possession of a plot of

\* F. A. F. O. No. 113 of 1907.

land. The suit was referred to arbitration on the 4th of March, 1907. The arbitrators submitted their award on the 2nd of April, 1907. On the 11th of April, 1907, objections were filed by the defendant. One of the objections was that one of the plaintiffs had died and that his heirs had not been brought on the record. The learned Munsif on the 20th of April, 1907, set aside the award and sent back the case to the arbitrators for decision, giving them time up to the 4th of May, 1907. He said :—" The arbitrators have submitted their award. It is objected to on the ground, *inter alia*, that one of the plaintiffs had died during the arbitration and before the award, hence the award is illegal. I am of opinion that this contention must prevail. The plaintiff Gopi Chand died two weeks before the 12th of April, 1907. The arbitrators not only delivered and made the award on the 2nd of April, 1907, but they examined witnesses on the 1st of April, 1907, *i.e.*, after the death of one of the plaintiffs. Of this fact (*i.e.*, the death of one of the plaintiffs) the other plaintiffs, the defendants, and possibly the arbitrators, could not have been ignorant. Hence the award is defective, as the representatives of the deceased plaintiff had not been brought on the record before the case was heard and award made by the arbitrators. Under these circumstances, the ruling in *Chetan Charan v. Balbhadra* (1) would not apply. The award must therefore be set aside. As the representative of the deceased plaintiff has been brought upon the record, and he agrees to the submission, it is ordered that the award of the 2nd of April, 1907, be set aside, and the case be sent back to the arbitrators for decision. The arbitrators are given time up to the 4th of May, 1907, to make their award."

The arbitrators made a fresh award and the learned Munsif passed a decree in accordance with that award. The defendants appealed and the learned Subordinate Judge sent the case back under section 562 of the Code of Civil Procedure. The plaintiffs have preferred an appeal from that order.

It is contended on their behalf that the court of first instance was competent to refer the case again to the arbitrators ; that its action amounted to a remission under section

(1) [1899] I. L. R., 21 All., 314,

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520 (c) of the Code of Civil Procedure, and that no appeal lay to the lower appellate court.

There is no force in these contentions. The learned Munsif in express terms set aside the award of the 2nd of April, 1907, as his order of the 20th of April, 1907, and his judgment of the 15th of May, 1907, show, and I can not construe his order of the 2nd of April, 1907, to mean that he remitted the award under section 520 (c). No objection to the legality of the award was apparent on the face of it. The learned Munsif could not, therefore, remit it under section 520 (c). See *Nanak Chand v. Ram Narain* (1). His finding that the arbitrators examined the witnesses after the death of one of the plaintiffs, and his remarks that the ruling in I. L. R., 21 All., 314, does not apply, clearly show that he, acting under section 521 (a), set aside the award of the 2nd of April, 1907, and it is too late to discuss now that he, in the absence of an express finding that the arbitrators had knowledge of the death of Gopi Chand, was not justified in setting the award aside. He did set it aside, and both the parties submitted to that order, and they cannot attack that order at this stage of their litigation. It is, however, argued that the award of the 2nd of April, 1907, in consequence of recording evidence after the death of one of the plaintiffs was waste paper, that the Munsif ignoring it could, on the basis of a subsisting agreement to refer to arbitration, *Perumalla Satya Narayana v. Perumalla Venkata* (2) refer it to arbitration again. No section of the Code of Civil Procedure is quoted in support of this argument, and the help of the inherent powers of a Court of Justice is invoked to legalize the action of the Court. This argument is of no use. Because after setting aside the first award, the power of the learned Munsif to refer the matters in dispute was exhausted.

When a matter in difference has once been referred to arbitration, the court by section 508 is precluded from dealing with it, save in accordance with the provisions of succeeding sections, and none of them confers upon that court a power to refer the matters in difference again to arbitration. The inherent powers of a court of Justice in opposition to the

(1) [1879] I. L. R., 2 All., 181. (2) [1903] I. L. R., 27 Mad., 112.

express provisions of section 508 of the Code of Civil Procedure are of no avail.

For the above reasons I would hold that the order of the lower appellate court is right, and would dismiss the appeal with costs.

GRIFFIN, J.—The question is not to my mind free from doubt, but I am not prepared to differ from the conclusion arrived at by my learned colleague. I concur in the proposed order.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

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## PRIVY COUNCIL.

THE BANK OF BOMBAY AND ANOTHER

*versus*

SULEMAN SOMJI AND OTHERS.

*Equitable mortgage—Mortgagor executor—Legatee having a charge, not bound—delay in setting up claim.*

In a suit to establish the priority of a charge in respect of an unpaid legacy over property of which an equitable mortgage was made, the mortgagors being residuary legatees as well as executors, and the mortgagees not being shown to have made any investigation of the title, *held*, that the claim must prevail over the mortgage.

A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore the mortgagee would be safe as against creditors.

*Graham v. Drummond*, L. R., [1896] 1 Ch., 968, 974, distinguished.

*In re Queale's Estate*, 17 L. R., (Ir.), 361, referred to.

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1908.

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LORD

MACNAGHTEN.

LORD ATKINSON.

SIR ANDREW\*

SCOBLE.

SIR ARTHUR

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Where the mortgage was executed long after the time when by the terms of the will the legacy was to be made up and paid, but the legacy had remained unsatisfied, lapse of time was, no doubt, a circumstance to be considered as implying the consent of the legatee to the executor's act, but the minority of two of the legatees at the time of the mortgage and the continued possession of the mortgagors rendered that principle inapplicable.

APPEAL from the judgment of Sir Lawrence Jenkins, C. J., and Batty, J, of the High Court of Judicature at Bombay.

The material facts appear from the judgment.

*Sir R. Finlay, K. C., Levett, K. C., and Frank Russell, K. C.,* for the appellants.

*Dankwertz, K. C., and Stokes,* for the respondents.

The judgment of their Lordships was delivered by

*Sir A. Scoble.*

SIR ANDREW SCOBLE.—The facts relating to this appeal are not in dispute, and may be shortly stated.

Somji Parpia died on the 15th February, 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September, 1890, deposited certain title deeds relating to the property in suit, by way of equitable mortgage, with the Bank; and on the 12th of January, 1899, the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000, in favour of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. Levett, in his able argument for the appellants contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J., in *Graham v. Drummond* (1), in which that learned Judge says (at p. 974):

" I think it is settled law that, if an executor who is also residuary legatee, sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

(1) [1896] L. R., 1 Ch., 968.

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But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and legatees is well pointed out in Spence's "Equitable Jurisdiction," vol. ii., p. 376, where it is said :—

"A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore the mortgagee would be safe as against creditors."

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the Bank, the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind; but having regard to the fact that, in this case, two of the younger sons were still minors when the title-deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will, their Lordships agree with the court below in holding the rights of the parties unaffected by this circumstance.

The case of *In re Queale's Estate* <sup>(2)</sup> bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a bank three leases to secure his own overdrawn account. The bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid

(2) 17 L. R. (Ireland), 361.

legacies, and their claim was allowed. In delivering judgment, FitzGibbon, L. J., says :—

“The Bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the bank can, in my opinion, have no better title than that which its debtor really had in the capacity in which he was dealt with, namely, as beneficial owner *i.e.*, as residuary legatee.”

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April, 1905, confirmed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: Messrs. *Cameron, Kemm & Co.*

Solicitors for the respondents: Messrs. *Rawle, Johnstone & Co.*

*Appeal dismissed.*

## GAYA PRASAD TEWARI

*versus*

## BHAGAT SINGH AND ANOTHER.

*Malicious prosecution—damages, suit for—Action taken by police—Prosecutor—Charge false to the knowledge of complainant.*

Where a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, he cannot be held responsible in damages for the failure of prosecution. But if the charge is false to the knowledge of the complainant and he misleads the police by bringing suborned witnesses or influences them to assist him in sending an innocent man to trial, he would be liable, although the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—who was the prosecutor? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion, the conduct of the complainant before and after making the charge must also be taken into consideration. *Fitz John v. Mackinder*, 9 C. B. N. S., 505; *Narsinga Row v. Muthaya Pillai*, I. L. R., 26 Mad., 362, referred to.

APPEAL from a judgment of the Judicial Commissioner of Oudh.

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LORD COLLINS.  
SIR ANDREW  
SCOBLE.  
SIR ARTHUR  
WILSON.

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1908.

GAYA PRASAD  
v.  
BHAGAT SINGH.

Suit to recover damages for malicious prosecution.

The material facts appear from the judgment.

The lower appellate court dismissed the suit.

Plaintiff appealed.

*L. DeGruyther, K. C.*, for the appellant.

No one appeared for the respondents.

The judgment of their Lordships was delivered by

*Sir A. Scoble.*

SIR ANDREW SCOBLE.—This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being manager of the Rampur Mathura estate, and the defendants being respectively Munsarim and Kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November, 1902, but was not disposed of until the 15th July, 1903, when the Magistrate dismissed it, holding that “there was no riot at all,” and adding :

“I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints.”

The plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that “it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime,” and he gave the plaintiff a decree for Rs. 6,082. 8 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narasinga Row v. Muthaya Pillai* <sup>(1)</sup>, dismissed the suit, holding that “if the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual”; but he added :

“I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found

(1) [1902] I. L. R., 26 Mad., 362.

false by the Magistrate who tried the case ; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (*ubi supra*) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms :—

" The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified ; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant ; if he misleads the police by bringing suborned witnesses to support it ; if he influences the police to assist him in sending an innocent man for trial before the magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor ? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion ; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and

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on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India, a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that "any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police . . . . Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry. As Bramwell, B., observes in *Fitz John v. Mackinder* <sup>(1)</sup>.

"This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, Cockburn, C. J., says (at p. 531):

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November, 1902, an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons, of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a Sub-Inspector of Police, who says:

"I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name. . . . When Bhagat Singh produced that list, I said to him that the complaint filed in court did not contain Gaya Parsad's name. How was it that the defendant had mentioned his name . . . ? And then Bhagat Singh [said] that the chief cause of riot was the plaintiff, so he gave the plaintiff's name in the list, and that he would be summoned."

(1) [1861] 9 C. B., N. S. 505, 522.

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and in the Magistrate's Court; and the learned Counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Prasad "joined the riot." As already mentioned, the Magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred, the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to His Majesty in Council, the learned Judicial Commissioners say :

"It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution, who makes a false report which results in a prosecution or who instigates the police to send persons up for trial under section 170 of the Code of Criminal Procedure, or who conducts the case against those persons when sent up for trial."

And they add :

"All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The respondents must pay the costs of the appeal.

Solicitors for the appellants : *Messrs. Sanderson, Adkin, Lee & Eddis.*

*Appeal allowed.*

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GAYA PRASAD  
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## HIGH COURT.

JANGI SINGH

*versus*

CHANDAR MAL.\*

CIVIL.

1908.

May, 20.

AIKMAN, J.  
GRIFFIN, J.

*Transfer of Property Act (IV of 1882), section 90—Right to decree—  
Part of contract—Limitation Act (XV of 1877), art. 116.*

A personal covenant to pay, although not expressed, is implied in and is an essential part of every simple mortgage. The right of the plaintiff to a decree under section 90 of the Transfer of Property Act is a part of and arises out of the contract in writing and registered and is governed by article 116 of the Limitation Act. *Sawaba v. Abaji*, I. L. R., 11 Bom., 475 ; not followed. *Unichaman v. Ahmed Kutti*, I. L. R., 21 Mad., 242 ; *Hamiduddin v. Kedar Nath*, I. L. R., 20 All., 385, referred to.

SECOND APPEAL against the order of the District Judge of Shahjahanpur, confirming an order of the Subordinate Judge.

Application for a decree under section 90 of the Transfer of Property Act.

The facts appear from the judgment.

*Surendra Nath Sen* (with him *Jogendra Nath Mukerji*), for the appellant.

*Beni Madhab Ghosh* (with him *J. N. Chaudri*), for the respondent.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal by a judgment-debtor. The question which we have to decide is whether an application made by the respondent for a decree against the appellant under section 90 of the Transfer of Property Act is time-barred. On the 5th of August, 1893, the appellant executed a deed of simple mortgage in favour of the respondent. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The respondent, on the 25th of July, 1900, instituted a suit for sale on the mortgage and also asked for a personal decree

\* S. A. No. 1174.

against the mortgagor. On the 16th of August, 1900, the respondent got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December, 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the respondent applied for a decree under section 90. The appellant raised an objection on the ground of limitation. This was overruled by the court of first instance and the decision of that court was affirmed on appeal by the learned District Judge. The judgment-debtor comes here in second appeal. The courts below have found that there was a payment by the appellant of interest on the 16th of June, 1895. That payment was within six years of the date when the suit was filed. On an application under section 90, it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. The learned vakil for the appellant contends, relying on the decision of the Bombay High Court in *Sawaba Khandapa v. Abaji Jotiraw* <sup>(1)</sup>, that, as there is not in the registered mortgage deed any personal covenant to pay, the respondent is not entitled to take advantage of article 116 of the second schedule of the Limitation Act, which allows a period of six years for a suit for breach of a contract in writing and registered. That decision does support the argument on behalf of the appellant. It was considered in a later Madras ruling in the case of *Unichaman v. Ahmad Kutti Kayi* <sup>(2)</sup>. In that case, the learned Judges remark:—"If this liability be taken to be one arising under a covenant implied by law as incidental to the mortgage contract, which was in writing and registered, then article 116 of the Limitation Act would apply, otherwise the appropriate article is 120, the case not being otherwise provided for." The Bombay ruling was distinguished on the ground that when it was decided the Transfer of Property Act was not in force in Bombay. Whether that would be sufficient for distinguishing the Bombay case in the present appeal we are not prepared to say. The facts of this case are on all fours with a case decided by this court, *Hamid-ud-*

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(1) [1887] I. L. R., 11 Bom., 475.

(2) [1897] I. L. R., 21 Mad., 242



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Aikman, J.

*din v. Kedar Nath* (\*). That case is against the appellant. It is true that in that case the special plea raised by the appellant was not considered. But we think that a personal covenant to pay, although not expressed is implied in and is an essential part of every simple mortgage. The respondent's right to a decree under section 90 therefore was a part of and arose out of a contract in writing and registered, and we think that he is entitled to the benefit of article 116. The result is that this appeal fails and is dismissed with costs.

*Appeal dismissed.*

(3) [1898] I. L. R., 20 All., 386.

CIVIL.

1908.

July, 22.  
STANLEY, C. J.  
BANERJI, J.

CHANDAR SHEKHAR

*versus*

KUNDAN LAL AND ANOTHER.\*

*Joint Property—Right of co-owner to have partition—Agreement among the owners that shares should remain joint—not enforceable.*

There were four brothers jointly entitled to certain zamindari property. One of the brothers died childless. One of the brothers brought a suit against the sons of the two others for partition. A compromise was entered into among the then defendants that their shares should remain joint. The plaintiff who was a defendant to that suit now applied under section 110, Land Revenue Act, to have his share separated :—

*Held*, that the application was maintainable.

The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right, and therefore, not enforceable.

APPEAL against the decision of Saiyed Asghar Ali, Assistant Collector of the first class of Meerut.

Application for partition.

The court below rejected the application.

Plaintiff appealed.

The material facts appear from the judgment.

*Gokul Prasad*, for the appellant.

\* F. A. No. 285 of 1906.

The respondents were not represented.

The judgment of the Court was delivered by

STANLEY, C. J.—This appeal is against an order of an Assistant Collector of the Revenue Court whereby he rejected the application of the plaintiff for partition of certain property. There were four brothers jointly entitled to certain property. They were Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram. Sheo Shankar died childless and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904, applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar, the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March, 1906, the plaintiff made the application, out of which this appeal has arisen for partition of his share, and his application has been rejected on the ground that it is barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that inasmuch as the plaintiff or his guardian on his behalf agreed on the former application that his share should remain joint, it is not open to him to institute proceedings for partition. We may mention that the plaintiff in the previous proceedings applied for partition of his share under section 110 of Act III of 1901, but his application was rejected on the ground that it had not been brought within 60 days, the period allowed for such application. So far as regards the former proceedings, no doubt, the plaintiff could not take advantage of the order for partition and obtain partition of his share, but this only applied to the proceedings then pending. It in no way prevented him from instituting a fresh application for the separation of his share, and the partition of the property remaining joint. The right of a co-owner to have partition of his share is incident to the right of ownership and an agreement not to partition for an indefinite period would be contrary to that right and therefore not enforceable. In the present case, there was no agreement not

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to claim partition. Therefore in our opinion the learned Assistant Collector was wrong in rejecting the plaintiff's claim. As he disposed of the case upon a preliminary point, we set aside his order, and remand the case to him under the provisions of section 562 of the Code of Civil Procedure, with directions that it be re-instated in the file of pending applications and be disposed of according to law. The plaintiff appellant will have the costs of this appeal. All other costs will abide the event.

*Appeal decreed. Cause remanded.*

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BANERJI, J.  
RICHARDS, J.

JAGAR NATH SINGH AND OTHERS

*versus*

LALTA PRASAD AND ANOTHER.\*

*Contract Act (IX of 1872) section 11—Contract by a minor—Indian Evidence Act, section 115—Estoppel against a minor—False and fraudulent misrepresentation by a minor—Principle of liability—Test applicable to such cases.*

*Per Banerji, J.* When a plaintiff made false and fraudulent representations as to his age with a view to induce the defendant at first to lend him and afterwards to purchase his property, held that in a suit to recover the property upon the ground that the contract was by reason of his minority void, the plaintiff was liable in equity to make restitution of the benefit he had obtained. *Mohori Bibee v. Dharmo Das Ghose*, I. L. R., 30 Cal., 539, distinguished. In a case like this the liability attaches to a minor not on the ground of estoppel but on the ground that an infant shall not take advantage of his own fraud. *Stikeman v. Dawson*, 16 L. J. Ch., 205, followed

*Per Richards, J.* Even assuming that an infant is liable for fraudulent misrepresentation in an action for deceit, and that the fraud of an infant may be set up as a defence when the infant seeks to set aside a transaction induced by his fraud, a fair test in a case when the infant sues to recover property sold by him, for awarding restitution of the money to the vendee, is to consider whether the defendant vendee on the evidence could succeed if he were suing as plaintiff in a suit for damages for fraudulent misrepresentation. The vendees in the present case not having proved that they were

\* F. A. No. 167 of 1906.

induced to enter into the contract of sale by the fraudulent misrepresentation of the minor plaintiff were not entitled to restitution of money. *Mohori Bibi v. Dharmo Das Ghose*, I. L. R., 30 Cal., 539; *Thurston v. Nottingham Building Society*, (1902) Chan. 1 and (1903) A. C., 6, referred to.

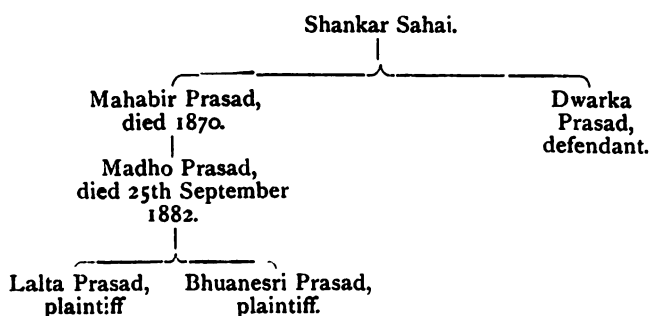
*Obiter* : *Per* Banerji, J. "I do not, deem it necessary to express any opinion on the point, although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants."

*Per* Richards J. "In my opinion the ordinary law as to estoppel does not apply to infants."

APPEAL against the decree of Babu Srish Chandra Bose, Subordinate Judge of Allahabad.

Suit for possession of property.

The following genealogical table will be useful in understanding the facts of this case.



Plaintiffs' case was that they were members of a joint Hindu family, governed by the Mitakshara School of Hindu law, that Mahabir Prasad their grand-father and Dwarka Prasad were joint owners of an eight annas share in village Kharaun, that Mahabir Prasad died in 1870 in a state of jointness, leaving him surviving a minor son Madho Prasad who died on the 25th September, 1882, leaving him surviving the plaintiffs who were then minors, that Lalta Prasad plaintiff No. 1 was born on the 24th of November, 1880, and Bhuaneshri Prasad, plaintiff No. 2 was born on the 17th of April, 1882, that Dwarka Prasad defendant was appointed their guardian in 1888, and that accordingly under the Indian Majority Act, Lalta Prasad plaintiff No. 1 attained majority on the 24th of November, 1901, and Bhuaneshri Prasad, plaintiff No. 2 attained majority on the 17th April, 1903. They alleged that their father Madho Prasad and Dwarka Prasad,

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had sold a  $2\frac{3}{4}$  share out of the 8 annas share in their village without any necessity, that subsequently Dwarka Prasad, who was a man of loose character sold a 2 anna 3 pie share and a 2 anna  $7\frac{1}{2}$  pie share to defendants, then a 3 pie share to Beni Kuar, and lastly he sold a 2 annas and 9 pies share to the defendants on the 28th June 1899. They alleged further that Dwarka made the plaintiffs while yet they were minors and of weak intellect, join him in the execution of the sale-deed mentioned last. Upon these facts, plaintiffs prayed that it might be declared that the sale deed of the 28th of June, 1899, was null and void, and that they might be put in possession of the share sold thereunder. The defendants vendees pleaded in their defence that they were *bona fide* purchasers for value, that as plaintiffs were members of a joint Hindu family no certificate of guardianship should have been issued with respect to them, that the suit for cancellation of the sale-deed was barred by time, that as a matter of fact plaintiff No. 1 was more than 30 years old and plaintiff No. 2 more than 28 years old at the date of the suit, that before the execution of the sale-deed in question, the plaintiffs had, purporting to act as adults, executed two mortgage deeds in favour of Sheobaran Singh, whereupon the defendants filed two suits for pre-emption, that the plaintiffs to this suit who were defendants to those two suits defended them as majors, and that in the end those suits were compromised, the present plaintiffs having entered into the compromise as adults, and that the present sale in the defendants' favour was one of the terms of the compromise, and that before transferring the property to Sheobaran Singh *etc.*, plaintiffs had as adults given a notice to the defendants. Upon these facts the defendants pleaded that the plaintiffs were estopped from pleading their minority and that their claim was also barred by section 13, Civil Procedure Code, as they had not pleaded their minority in the pre-emption suits. They claimed restitution of the money in case the plaintiff's suit was denied. The Subordinate Judge who tried the suit found upon evidence that plaintiffs were minors at the date of the sale but that the plaintiffs led the defendants to believe that they were majors, and that "had the defendants known the plaintiffs to be minors, they would not have entered into the *Sulehnamah* in the

pre-emption suits nor into this sale transaction." But in view of the rulings in I. L. R., 26 Cal., 381 and I. L. R., 30 Cal., 539, he held that the plea of estoppel could not be urged against the plaintiffs who were minors. He further found that the suit for declaration was not time-barred, that no certificate of guardianship should have been granted but having been granted, it had the effect of extending the plaintiffs minority. He also found that the sale had been made for purposes of family. In the result he decreed the suit of the plaintiffs subject to their refunding Rs. 5,416-10-0 to the defendants vendees. Against this decree both parties appealed to the High Court.

*Tej Bahadur Sapru* (with him *Durga Charan Banerji*), for the defendants (vendees) appellants, first argued the case upon the merits and contended that the evidence did not prove that plaintiffs respondents were minors at the date of sale. He next argued the question of estoppel. He submitted that the rule of estoppel was contained in section 115 of the Indian Evidence Act and submitted that there was no warrant for holding that the words 'one person' in the section meant 'one *major person*'. In principle there was no reason why an infant should be treated on a different footing from an adult so far as this section was concerned. A distinction should be made between a contract which rested upon an act of two parties, and an estoppel which was merely a rule of evidence and created no substantive right. He next urged that there was fraudulent representation as to age by the plaintiffs, and as they were seeking to set aside the sale, they must refund the money they had received. He submitted that while fraud was not necessarily a part of estoppel, it always arose where the action of deceit would be maintainable. He cited and discussed the following authorities.

Bigelow on Estoppel, pp. 599, 606 and 607.

Taylor on Evidence, vol I, p. 589.

Pollock on Contract, p. 73, 505 and 537.

Trevelyan on Minors, p. 14.

*Sarat Chunder Mitter v. Mohun Bibee*, [1898] I. L. R., 25 Cal., 371.

*Brohmo Dutt v. Dharmo Das Ghose*, [1898] I. L. R., 26 Cal., 381

*Dhannumull v. Ram Chunder Ghose*, [1890] I. L. R., 24 Cal., 265.

*Ram Ratun Singh v. Shew Nandan Singh*, [1901] I. L. R., 29 Cal., 126.

*Mohori Bibee v. Dharmo Das Ghose*, [1903] I. L. R., 30 Cal., 539.

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*Ganesh Lala v. Bapu*, [1895] 1. L. R., 21 Bom., 198.*Stikeman v. Dawson*, [1847] 1 De. Gex. & Sm., 90.*Mills v. Fox*, [1888] L. R., 37 Ch. D., 153.*Thurston v. Nottingham Building Society*, [1902] 1 Ch. 1,*S. C. on appeal*, [1903] A. C., 6.

(The argument on other points is omitted).

*Sundar Lal* (with him *Jang Bahadur Lal*), for the plaintiffs-respondents, first argued the case on facts and then contended that defendants had failed to show that there was any fraudulent representation on the part of the plaintiffs, and that no estoppel could under the circumstances arise. He submitted that the contract of a minor being void, the practical effect of allowing a plea of estoppel against him would be to validate a void contract. He cited

*Stikeman v. Dawson*, (1847), 16. L. J. Ch., 205. S. C. 1 De. Gex. & Sm.

He next discussed the authorities cited for the appellants.

*Tej Bahadur Sapru* replied.

The following judgments were delivered.

*Banerji, J.*

BANERJI, J.—This and the connected F. A. No. 118 of 1906 arise out of a suit brought by the respondents Lalta Prasad and Bhuaneshri Prasad for possession of a 2 annas 6 pie share of zamindari, and for a declaration that a sale-deed, dated the 28th of June, 1899, executed by them jointly with one Dwarka Prasad, in respect of the said share, is null and void.

The plaintiffs are the sons of Lala Madho Prasad whose paternal uncle is the aforesaid Dwarka Prasad. After the death of Madho Prasad in 1882, Dwarka Prasad applied for and obtained in 1888 a certificate of guardianship of the persons and property of the plaintiffs who were minors at the date of their father's death. Madho Prasad and Dwarka Prasad jointly owned an 8 annas share in the village Kharaun, out of which Madho Prasad in his life-time sold 2 annas 9 pies, and Dwarka Prasad sold 2 annas 6 pies after Madho Prasad's death. The remaining 2 annas 9 pies was sold by the plaintiffs, and Dwarka Prasad on the 28th of June, 1899, to Jagarnath Singh defendant, and the predecessors-in-title of defendants Nos. 2 to 11. The plaintiffs state that they were minors at the date of the sale; that they are persons of weak

intellect and inexperienced ; that they executed the sale-deed under the influence of Dwarka Prasad who is an extravagant man of dissolute habits ; that they did not derive any benefit from the sale ; that the sale was effected without any necessity ; and that they did not receive any part of the consideration for it. On these grounds they seek to set aside the sale, and recover possession of the portion of the property sold of which the purchasers have taken possession.

The defendants deny that the plaintiffs were minors at the date of the sale and assert that the plaintiffs represented themselves to be of full age, and thus induced them to purchase the property. They contend that the plaintiffs are estopped from maintaining the suit and that in any case they are bound to make restitution of the amount of consideration for the sale

The court below found that the age of the plaintiffs was below 21 years on the date of the execution of the sale-deed, and that they were minors and incompetent to make the contract of sale. Following the ruling of their Lordships of the Privy Council in *Mohori Bibi v. Dharmodas Ghose* <sup>(1)</sup>, the learned Subordinate Judge held the sale to be void. He, however, was of opinion that the plaintiffs had made fraudulent misrepresentations to the purchasers as to their age and that they benefited by the sale. He accordingly made a decree for possession on condition that the plaintiffs should refund so much of the consideration for the sale as represented the value of the share decreed to them.

Against this decree, the defendants purchasers have preferred this appeal, and the plaintiffs have preferred appeal No. 118. The defendants repeat the pleas advanced by them in the court below. The plaintiffs contend that they are not liable to make any restitution.

After arguments were heard in both the appeals, the learned Advocates for the parties informed us that there was some likelihood of a compromise. We accordingly deferred judgment. The parties, however, have not come to any terms, and we must decide the appeals.

(1) [1903] I. L. R., 30 Cal., 539.

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The first question is that of the age of the two plaintiffs. It was conceded at the hearing that as a guardian of the plaintiffs was appointed by the court they must be deemed to have been minors until they attained the age of 21. It is alleged on behalf of the plaintiffs that Lalta Prasad plaintiff was born on 24th November, 1880, and Bhuaneshri Prasad, on 17th April, 1882. If this allegation is true, the former attained majority in 1901, and the latter in 1903. So that both of them were under age when they granted the sale-deed. At the time of registration of the sale-deed, however, the former stated his age to be 24 and the latter 22. As has been stated above, the learned Subordinate Judge has found that both the plaintiffs were under the age of 21 years when they executed the sale-deed. After carefully considering the evidence, I find it impossible to come to a different conclusion. It has been abundantly proved that Madho Prasad, the father of the plaintiffs died in 1882. The witnesses for the plaintiffs who are men of position and respectability swear that at that time Bhuaneshri was about six months old, and Lalta Prasad about eighteen months. There is no reason to disbelieve these witnesses, and it is most unlikely that they have made a mistake. The most important evidence on the point is afforded by the fact that when on the 3rd of April, 1888, Dwarka Prasad applied for a certificate of guardianship, he stated in his application that the age of Lalta Prasad was 7, and that of Bhuaneshri 6 years. Dwarka Prasad has been examined in this case and has supported his former allegation. He had no motive in 1888 for understating the age of each of his grand-nephews, and I see no reason to assume that he did so. According to the evidence of Lt.-Col. Emerson, the Civil Surgeon the plaintiffs were not of full age in 1899. On this point, I fully agree with the finding of the court below.

As the plaintiffs were minors at the date of the sale-deed, they were incompetent to make a contract of sale, and according to the ruling of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*, referred to above the sale must be held to be absolutely void.

It is contended that as the plaintiffs falsely represented to the appellants that they were of full age and thereby induced

the appellants to purchase their property and pay them the price of it, they are estopped from proving their true age and denying the validity of the sale made by them. Reliance is placed on the provisions of section 115 of the Evidence Act, which it is urged, applies to minors also. The authorities on the question whether that section applies to minors are divergent. Whilst it was held by some of the Judges of the Calcutta High Court in *Brohmo Dutt v. Dharmodas Ghose* (1), that the section applies only to persons of full age, the contrary view was held by the Bombay High Court in *Ganesh Lala v. Bapu* (2). I do not, however, deem it necessary to express any opinion on the point, although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants. (See Bigelow on Estoppel, p. 599, *et. seq.*) In my opinion, the law of estoppel can only be applied subject to the other provisions of law and therefore when, as held by the Privy Council, a contract by a minor is void under the provisions of the Contract Act, the law of estoppel cannot be invoked in aid to validate that which is void under the law. The law on the subject is thus stated in Pollock on Contracts, 6th edition, p. 73 :—"When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity, which, however, in the case of a contract is not an obligation to perform the contract and must be carefully distinguished from it. Indeed it is not a contractual obligation at all." It is limited to this extent "that the infant is liable to restore any advantage he has obtained by such representation to the person from whom he has obtained it" (p. 52). This was held in *Stikeman v. Dawson* (3), and other cases to which it is needless to refer. In that case Vice Chancellor Knight Bruce observed that for false representation or a fraudulent suppression or concealment, the minor was answerable in equity after his majority, notwithstanding his minority at the time. This liability attaches to a minor not on the ground of estoppel but as Sir Frederick Pollock points out on the ground that "an infant shall not take advantage of his own fraud." If, however, the fact of minority

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(1) [1898] 1. L. R., 26 Cal., 381. (2) [1895] 1. L. R., 21 Bom., 198.

(3) [1847] 16 L. J., Ch., 205

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was known and there was no deception, restitution cannot be ordered. No question of estoppel therefore arises in this case, and what we have to consider is whether the plaintiffs made any fraudulent misrepresentation as to their age which deceived the appellants, and induced them to purchase the property in question.

The circumstances which led up to the sale of the 28th of June, 1899, are these : on the 26th of August, 1893, Dwarka Prasad borrowed Rs. 400 from some of the appellants, and hypothecated  $4\frac{1}{2}$  pie share. In lieu of that sum and interest due thereon and a further advance of Rs. 665 in cash for the expenses of the marriage of Lalta Prasad, plaintiff, a mortgage bond for Rs. 1200 was executed by Dwarka Prasad, and Lalta Prasad on the 9th of June, 1897. On that occasion Lalta Prasad stated his age to be 22 years. On 11th. April, 1898, Lalta Prasad alone borrowed Rs 799-12 from Shiubaran Singh and others and executed a mortgage of 1 anna 3 pie share. On this occasion also he stated his age to be about 22 years. On 7th January, 1899, Bhuaneshri borrowed Rs. 800 from Babu Karan Singh, and executed a mortgage of 1 anna 3 pie 15 krant share. He stated before the Sub-Registrar that his age was about 22 years and received the money in the presence of that officer. So that long before the execution of the sale-deed in suit, the two brothers executed three documents and represented themselves to be persons of full age. In respect of the last two mortgages, the appellants brought suits for pre-emption, and these suits were defended by the plaintiffs as persons of full age, and they filed written statements in that character on the 17th of February, 1899. Before that date, that is on the 16th of February, 1899, the two plaintiffs and Dwarka Prasad sent a notice to the appellants informing them that they were desirous of selling a 3 annas share in the village Kharaun, and that the price had been settled with Shiubaran Singh and others at Rs. 8000, and they asked the appellants if they would purchase that share for the aforesaid price. They further stated in the notice that the sale should be completed within ten days, otherwise the property would be sold to Shiubaran Singh and others. An answer to this notice was sent on 23rd February, 1899, expressing readiness to purchase for a reason-

able price. After this, the pre-emption suits were compromised, and petitions of compromise were filed on 15th March, 1899, in which Lalta Prasad and Bhuaneshri said that it had been agreed with the present appellants, the plaintiffs in those suits, that each of the two brothers would sell to the appellants a 1 anna 3 pie 15 krant share for a consideration of Rs. 2800. In the written statements, the notice and the petitions of compromise mentioned above, the plaintiffs professed to act as persons of full age. Decrees were passed in the pre-emption suits against the plaintiffs, in accordance with the compromise, and in the decrees their names appear as those of persons of full age. It was in pursuance of the terms of the compromise that the sale-deed of 28th June, 1899, was executed. The property sold was a 2 annas 9 pies share, and the consideration was Rs. 5,958-5-0 which was made up of Rs. 1674-8-0 due to Shiubaran Singh and others on the mortgages of 11th April, 1898, and 6th January, 1899; Rs 1,420-8-0 due on account of the mortgage of 9th June, 1897, and Rs. 2,863-5-0 paid in cash before the Sub-Registrar. At the time of registration of this document, Lalta Prasad stated his age to be about 24 and Bhuaneshri about 22 years. It is thus manifest that not only at the date of the execution of the sale-deed in question did the plaintiffs represent themselves to be of full age, but in 1897, 1898 and 1899 they executed documents in favour of the appellants and other persons in which they made similar representations, and at no time was it ever hinted that they were minors. As in fact they were minors, these representations were falsely made, and they were clearly made with a view to induce the appellants to advance them money and purchase their property on the faith of these representations. If the appellants or any of them was aware of their true age they had no object in obtaining documents from them without the intervention of a guardian. I fully agree with the following observations of the learned Subordinate Judge: "There is no satisfactory evidence on the record to show that the defendants knew the true age of the plaintiffs, and were not misled by their untrue statements. The defendants are residents of Ghazipur, while the plaintiffs are residents of Jaunpur. There is no reason to believe that the defendants knowingly entered

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into a contract with minors. Had they known the plaintiffs to be minors they would not have entered into the *Suleh-namas* in the pre-emption suit nor into this sale transaction. The facts are all against the supposition that the defendants knew the plaintiffs to be minors," It is true Sita Ram appellant stated that he had known Bhuaneshri for thirteen years but Sitaram was not one of the purchasers under the sale deed, and it does not appear that any of the purchasers had even seen the plaintiffs before they entered into the transactions of 1897 and 1898. The Sub-Registrar who registered the deeds mentioned above has given evidence in this case and has stated that he considered the plaintiffs to be men of full age, and it is not surprising that the appellants also considered them to be of full age, and were as much deceived on the point as the Sub-Registrar. In my judgment, the plaintiffs made false representations as to their age with a view to induce the purchasers at first to lend them money, and afterwards to purchase their property, and that these representations were fraudulently made. The plaintiffs are therefore liable in equity to make restitutions for the benefit they obtained.

The learned Subordinate Judge has ordered the plaintiffs to refund Rs. 5,416-10-5, out of the consideration for the sale. He is of opinion that the whole of this money was received by the plaintiffs and this finding is, in my opinion, justified by the evidence. The endorsement of the Sub-Registrar on the sale-deed shows that Rs. 2863-5-0 was received by Lalta Prasad in his presence. Lalta Prasad has not repudiated the correctness of this entry, and he has not by his own deposition or by any other evidence proved that he returned the money or gave it to Dwarka Prasad. He borrowed Rs. 799-12 from Shiubaran Singh and others, and Bhuaneshri borrowed Rs. 800 from them. These amounts, together with interest, were due by them, and the total sum due was Rs. 1674-8. It has been proved that this sum was paid by the appellants to the creditors Shiubaran Singh and others. Of the amount of the bond of 9th June, 1897, Lalta Prasad took Rs. 665 for the expenses of his marriage. This amount together with interest, was clearly due by him alone, and as it was set off against the consideration for the sale-deed, he

has benefited to the extent of the amount due by him. It has thus been abundantly proved that the two plaintiffs who are admittedly joint received and benefited by the amount which the court below has directed to be restored by them. As pointed out by that court, although they were minors in the eye of the law they were grown up young men when they received the money. Lalta Prasad was on his own showing about 19 years old and Bhuaneshri over 17. They were old enough to understand and know their own interests, and it is most unlikely that they were entirely under the influence of Dwarka Prasad. They are therefore liable to make restitution of the amounts by which they have benefited. In the case of *Mohori Bibee v. Dharmo Das Ghose* (1), restitution was not ordered but that was apparently on the ground that the mortgagee in that case had advanced the money with full knowledge of the age of the plaintiff and was not deceived. In the present case I am of opinion that the purchasers were ignorant of the true age of the plaintiffs, and were deceived by their misrepresentations. I would therefore dismiss both the appeals with costs.

RICHARDS, J.—These appeals arise out of a suit for a declaration of the plaintiffs' title to certain property and for a declaration that a certain sale deed dated the 28th of June 1899, was void against the plaintiffs. The plaintiffs are the sons of one Lala Madho Parshad. Lala Madho Parshad was the son of Lala Mahabir Parshad. Lala Mahabir Parshad was a brother of the defendant Lala Dwarka Parshad. These persons were all members of a joint Hindu family, and the property in question was part of the joint family estate. Mahabir Parshad died in 1870, leaving Madho Parshad his son a minor, him surviving. The share of the family was an eight anna zamindari share. After the death of Mahabir Parshad Dwarka and Madho sold a  $2\frac{3}{4}$  share out of the eight anna share. Madho died on the 25th of September, 1882, leaving the plaintiffs' infant children him surviving. In 1891, Dwarka Parshad sold a two anna three pie share and also a two anna seven and a half pie to certain persons now represented by the defendants I to II.

(1) [1903] 30 Cal., 539.

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The plaintiffs did not join in this sale.

On the 28th of June, 1899, Dwarka Parshad and the plaintiffs sold a three pie share to one Beni Koeri and others, and the remaining two anna 9 pie share to persons represented by the defendant I to II.

It is in effect to set aside the deed transferring this two anna 9 pie share that the present suit is brought. The plaintiffs allege that the plaintiff No. 1 Lalta Parshad was born on the 24th of November, 1880, and that the plaintiff No. 2 Lala Bhuaneshri Parshad was born on the 17th April, 1882, and that they attained majority on the 24th November, 1901, and the 17th of April, 1903, respectively, that they received no consideration and that the sale was a fraud upon them. The defendants I to II allege that the plaintiffs were of full age when they executed the sale deed and that even if they were not they represented themselves as being of full age and that therefore they ought not to be allowed to set up the minority.

A certificate of guardianship of the person and property of the plaintiffs was granted in the year 1888 to Dwarka Parshad, and accordingly under the provisions of Act 40 of 1858, the plaintiffs did not attain majority until they reached the age of 21 years respectively. The court below has found that the plaintiffs were minors at the time the sale deed of the 28th of June, 1899, was executed. The learned Subordinate Judge says "The fact of the plaintiffs being minors is established beyond any reasonable doubt" I entirely agree with that finding. Dwarka Parshad, the guardian of the minors, was examined and proved that they were minors. Perhaps not much reliance should be placed on his uncorroborated evidence but on the 10th of March, 1888, he made an application to the District Judge to be appointed guardian of the minors (he was subsequently appointed guardian), he then gave the ages of the plaintiffs as seven years and six years, respectively. In the year 1888, Dwarka had no object or motive for understating the ages of his nephews, and it is impossible not to give great weight to this corroboration of his evidence. The Civil Surgeon examined the plaintiffs on the 25th of November, 1905, and he stated the age of the elder plaintiff to be then twenty four years, and the younger plaintiff

twenty two years. This was six years after the execution of the deed in question, and unless the Civil Surgeon was very much in error, the plaintiffs must have been under twenty one years in June, 1899. There was a lot of other evidence which is not perhaps very definite but the age of the plaintiffs, particularly of the plaintiff Bhuaneshri Parshad is fixed by the death of their father Madho Parshad which unquestionably happened not earlier than 1882. Bhauneshri Parshad was then an infant in arms.

In 1899, the plaintiffs were recorded as minors. On the last day of hearing of the appeal, the last mentioned plaintiff was in court and he appears even now to be a very young man. I think it is pretty clear from the evidence that Dwarka was at least an extravagant man: he very soon dissipated almost his entire interest in the family property, it was quite unnecessary for him to have applied for a certificate of guardianship to his nephews as the family was joint and I have no doubt that his object in getting himself appointed was to enable him the more effectually to dispose of the minors' property. I also think that there is a good deal in the case to suggest that the interests of the plaintiffs were not very well looked after. The defendants or the persons whom they represent had become co-sharers in 1891, and I think it hard to believe that they were unaware of the plaintiff's real age. In fact one of the defendants Sita Ram admits that he had seen the second plaintiff visiting the village "for the last twelve or thirteen years." I shall now proceed to consider the evidence as to the alleged representation by the plaintiffs that they were of full age. The plaintiffs went before the Registrar in 1897, 1898 and 1899 in connection with the registration of certain mortgages. It is not very clear what occurred before the Registrar but they apparently did give their ages as being over 21 years. Possibly the Registrar was deceived, but the Registrar was not the purchaser. They also defended a suit or suits as adults. There is however no evidence that in the negotiations for the sale of the 28th June, 1899, or at any time up to the execution of the deed the plaintiffs ever represented themselves to the defendants (or to the persons now represented by the defendants) as being of full age. None of the defendants have come forward to say that they were in fact misled

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by the representation of the plaintiff or that they ever made any enquiry about their ages. The defendant Sita Ram says that the sale deed sued on was executed under his superintendence and in cross-examination he admitted that he had been seeing Bhuaneshri Parshad for 12 or 13 years. I am quite satisfied that Sita Ram knew that plaintiff No. 2 at least was under 21 years. I believe the truth to be that the defendants, who had already acquired the greater part of Dwarka's share were naturally very anxious to acquire the remaining shares and were prepared to be at the risk of purchasing from minors. I think it quite impossible to hold that the plaintiffs were guilty of fraudulent misrepresentation of their ages committed for the purpose of deceiving the defendants or their representatives and inducing them to buy the property. The learned Subordinate Judge did not frame any express issue as to whether or not there had been fraudulent misrepresentation by the plaintiffs as to their ages. At pages 20 and 21 of the judgment however he refers to two pre-emption suits brought by the defendants against the plaintiffs and the uncle Dwarka: these suits were defended by the plaintiffs as adults and the learned Judge says that the plaintiffs ought to have brought to the notice of the court that they were minors and later on at page 21 he says "*If ever a fraud* was committed upon a court deliberately and with the object of injuring the other party this is such a case" On the strength of this supposed fraud, the learned Judge has ordered the plaintiffs to refund the sale consideration as a condition to setting aside the sale deed. Surely this is a strange ground for holding minors guilty of fraud. I think the evidence goes to show that the whole litigation was managed by Dwarka and that the plaintiffs were under his influence and ready to do whatever he told them to do, and I think it quite impossible to hold that the plaintiffs were guilty of fraudulent misrepresentation merely because when sued as adults they neglected to inform the court of their minority. In my opinion, the ordinary law as to estoppel does not apply to infants, and this was practically admitted in the argument. It is said, however, that an infant is liable for fraudulent misrepresentation in an action for deceit, and that the fraud of an infant may therefore be upset as a defence when the infant seeks to set aside a trans-

action induced by his fraud. Assuming this for the purpose of argument to be so, I think it a fair test in this case to consider whether the defendants *on the evidence* could succeed if they were suing as plaintiffs in a suit for damages for fraudulent misrepresentation. I certainly hold they could not. In such a suit the plaintiffs should prove that they were induced to enter into the contract of sale by the fraudulent misrepresentation of the defendant, and that the plaintiff (purchaser) was in fact deceived and really did not know the true state of the facts. They (the defendants) have never even come forward to say that they were in fact misled or deceived. The evidence is altogether consistent with the plaintiffs acting under the influence of their uncle, and the defendant's agent Sita Ram, I believe, knew well that the plaintiffs were minors. One question further remains, namely, should the court direct the plaintiffs to make any compensation to the defendants, and if so to what extent. The court below directed that Rs. 5,416-10-5 should be paid by the plaintiffs before getting possession. It seems to me that the policy of the law is to protect infants against themselves as well as against others. In the case of *Mohori Bibi v. Dharmo Das Ghose* <sup>(1)</sup>, their Lordships of the Privy Council held that a minor was wholly incapable of making contracts. Section 64 of the Contract Act, therefore does not apply. In the case cited, the minor was within a few months of being 21 years when he executed the mortgage, and yet the latter was set aside without any compensation. Dealing with the question of compensation, their Lordships quote the following passage from the judgment of Lord Justice Romer in the case of *Thurston v. Nottingham Building Society*, <sup>(2)</sup>. "The short answer is that a court of equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which as against that person the Legislature has declared to be void."

In the case of *Thurston v. Nottingham Permanent Building Society*, the infant was allowed to keep the entire advance made to her by the Society for the purpose of completing buildings on her property. I can see no reason for

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(1) [1903] 30 Cal., 539.

(2) [1902] 1 Ch., 1 and [1903] A. C., 6.

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directing the plaintiffs to refund the entire purchase money. Furthermore the cases of both the plaintiffs are not quite identical. Lalta Parshad was not only the elder of the two but he seems to have received a larger amount of money. Lalta Parshad as sole mortgagor mortgaged 1 anna 3 pie share on 11th April, 1898. Bhuaneshri Parshad in like manner on 7th January, 1899, mortgaged a one anna 3 pie 15 krant share.

The defendants or their representatives brought suits for pre-emption against Lalta and Bhuaneshri in respect of these mortgages. (These are the suits the plaintiffs defended as adults). The suits were compromised and decrees made in the terms of the compromise. By these compromises the defendants in the present suit were to pay Rs. 829 with interest to the mortgagees in respect of Lalta's mortgage and Rs. 52-8-0 costs. They were also to pay Rs. 811 with interest and Rs. 52-8-0 costs in respect of Bhuaneshri Prasad's mortgage. In the sale-deed of 11th April, 1899, it is recited that Rs. 1,674-8-0 was paid to the mortgagees on foot of these mortgages. The shares of the plaintiffs in respect of this sum of Rs. 1,674-8-0 were practically equal in amount and I treat them as equal. Lalta had had a further advance of Rs. 665 on foot of the mortgage made by him and his uncle on 9th June, 1897, and under the terms of the sale-deed, this mortgage was also paid off. It may therefore be said that on the sale of the 28th June, 1899, debts of Lalta's to third parties were discharged as follows, Rs. 665, Rs. 837-4-0 (half of Rs. 1,674-8-0) and Rs. 52-8-0 costs, total Rs. 1,554-12. In the case of Bhuaneshri, debts were in like manner discharged Rs. 837-4-0 (half of Rs. 1,674-8) and Rs. 52-8-0 costs, total Rs. 889-12-0. Lalta was married in 1897 and the Rs. 665 were for his marriage expenses. I think that it would be reasonable under the provisions of section 41 of the Specific Relief Act to direct that plaintiff Lalta should pay to the defendants the sum of Rs. 1,554-12-0 as a condition to getting possession, and that the plaintiff Bhuaneshri should in like manner pay the sum of Rs. 889-12-0, and I would to this extent modify the decree of the lower court. These sums represent mortgage debts paid to third parties. The mortgages have never

been set aside, and I think that these mortgage debts stand on a different basis from the other monies which the court below has directed the plaintiffs to pay as a condition to getting possession. I would dismiss the defendant's appeal, and allow the appeal of the plaintiffs to the extent mentioned above.

BY THE COURT.—This appeal is dismissed with costs, including in this Court fees on the higher scale.

S.

*Appeal dismissed.*

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*versus*

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*Code of Criminal Procedure (Act V of 1898), section 337—Oral sanction of District Magistrate—Pardon—Legal—Statement on oath of approver—admissible against him when pardon forfeited—Joint trial—Irregularity.*

There is no provision of law in the Criminal Procedure Code which lays down that an approver to whom pardon has been tendered and who does not fulfil the conditions on which the pardon was tendered cannot be tried at the same trial with the other accused. Where, therefore, an approver whose pardon was forfeited was tried along with the other accused, *held* that the joint trial did not vitiate the proceedings.

The provisions of section 337 of the Code are very salutary provisions, the neglect of which may lead to difficulties. But where a confession was made before a Magistrate who, with the oral sanction of the District Magistrate tendered, the accused confessing his guilt, a pardon which was accepted but which was subsequently withdrawn *held* that the statement made by such an approver on oath could be used in evidence against him when he was subsequently tried. *Held*, further that the tender of pardon although irregular was legal. *Queen-Empress v. Chidda*, I. L. R., 20 All. 40, distinguished.

CRIMINAL APPEAL against an order of C. Rustomji Esq., Sessions Judge of Allahabad.

Two women were murdered at midday in the city of Allahabad. Suspicion fell on the appellants and they were arrested. Sarju, one of the appellants was tendered a pardon by Mr. Moore, the Joint Magistrate of Allahabad. At the time Mr. Moore was not the Magistrate investigating the case.

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Sarju made a statement implicating all the applicants, but subsequently withdrew the statement. His pardon was withdrawn and he was tried with the other accused. The Sessions Judge found the appellants guilty and sentenced them to death. The High Court summoned Mr. Moore and examined him. He stated that the pardon was tendered with the sanction of the District Magistrate.

*C. C. Dillon*, for the appellants, Thakur and Kandhai, argued that the trial of the three appellants Thakur, Kandhai and Sultan Khan with that of Sarju was illegal and prejudiced the appellants. Sarju, who was an approver and whose pardon had been withdrawn should have been tried separately and not put back from the witness box to the dock. He cited

*Queen-Empress v. Mulua*, [1892] I. L. R., 14 All., 502.

*The Queen v. Petumbre Dhobee*, [1870] 14 W. R. Cr., 10.

*Queen-Empress v. Rama Jevan*, [1892] I. L. R., 15 Mad., 352.

*Queen-Empress v. Bhau*, [1899] I. L. R., 23 Bom., 493.

He then addressed the Court on the evidence.

*Sunder Lal*, (*Durga Charan Banerji* and *Datti Lal* with him) for Sultan Khan, continued the argument on the evidence and submitted that the evidence for the prosecution even if believed did not make out a case against the appellants.

*Satya Chandra Mukerji*, (*E. A. Howard* and *Gokul Prasad* with him) for Sarju, contended that the joint trial was illegal. Besides the cases already cited he referred to

*Queen-Empress v. Sudra*, [1892] I. L. R., 14 All., 336.

*King-Emperor v. Bala* [1901] I. L. R., 25 Bom., 675.

*Queen-Empress v. Ramasami*, [1901] I. L. R., 24 Mad., 321.

[GRIFFIN, J., referred to

*Queen-Empress v. Brij Narain Man*, [1898] I. L. R., 20 All., 529 as an authority the other way].

The statement of Sarju was made under the promise of a pardon. It could not be admitted in evidence even against him because it was made under an invalid tender of pardon and it was caused by inducement and promise within the meaning of section 24 of Act I of 1872. Mr. Moore, when he tendered the pardon was not enquiring into the offence and he was not competent to tender a pardon under section 337, Criminal Procedure Code.

He relied on

*Queen-Empress v. Chiada*, [1898] I. L. R., 20 All., 40.

*Empress of India v. Asghar Ali*, [1880] I. L. R., 2 All., 260.

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*Ross Alston*, for the Crown, contended that the statement of Sarju was a confession within the meaning of section 30 of the Indian Evidence Act, and as such admissible against all the accused. He tendered Mr. Moore as a witness. Mr. Moore, deposed that he had tendered pardon to Sarju under the verbal orders of the District Magistrate.

The judgment of the Court was delivered by

KNOX, J. Sultan Khan, Pathan, Thakur Prasad and Kandhai, Agarwalas and Sarju, Ahir, have been convicted by the court of Sessions, Allahabad, of the offence of murder and all four of them sentenced to death. The case comes before us for confirmation of the sentences passed, and we have also to consider a memorandum of appeal put forward by the four convicts. Each of them has been represented before us and we have been taken through the whole of the evidence. It is common ground that on the 13th of March last, Musammat Sona, Agarwalin, and Musammat Kasturia, Sonarin, were murdered in the heart of Allahabad in close proximity to the principal Police Station sometime in the afternoon of that day. The case for the prosecution is that there has been an intrigue of some standing between one Ram Jiawan and one Musammat Shama Bibi a widowed niece of Badri Pershad. Badri Pershad is a man of considerable importance, an Honorary Magistrate and a vakil. He was charged with abetment of this murder and tried along with the present accused but was acquitted by the court of Sessions. The two convicts Thakur Parshad and Kandhai are closely related to him, the others are his servants. It is said that Thakur Parshad and Kandhai went to Badri Pershad and persuaded him to kill both Ram Jiawan and Musammat Kasturia, the latter being accused of helping in the intrigue already mentioned between Shama and Ram Jiawan. The murder was to have taken place on the 12th, but the murderers on going to the house found the outer door closed and thought it better to await another opportunity. On the 13th, they effected an entrance somewhere between the hours of 1 and 3. We cannot fix the exact time of the murder

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with certainty, for the evidence upon this point is very conflicting. The murderers first came upon the Sonarin. Sultan Khan caught her hair, pressed her down and hit her 5 or 6 times with a chopper on the neck and the head. Ram Jiawan's mother, an old lady of 75 years of age, and represented as short-sighted and almost paralytic, called out upon hearing the disturbance, and it is said that Sultan Khan then went and hit her also four or five times with a chopper on the neck and the right hand. News of what had happened reached Ram Jiawan who was at his shop close to the Kotwali. He went at once and seeing the state of affairs returned to the Police Station and recorded his report between 3 and 3-30 P. M. The police came to the spot. They found the old lady still living and Kasturia lying dead in the *dalan* facing south. Sona was taken to the Kotwali and died shortly after. In spite of every effort being made the police found no clue until the 27th of March. We are not informed as to what was the exact nature of the clue that they then received. Some further clue appears to have been obtained on the 10th of April but no active steps were taken until the 29th of April, when the police questioned Sarju. On the 30th, they went further and arrested Sarju, Thakur Parshad, Kandhai and Sultan. On the 1st of May, Sarju was produced before Mr. Moore, Joint Magistrate and made a statement to which we shall again refer. As a result of this statement, Badri Prasad was arrested on the 9th of May. Two important witnesses were examined by the police, one being Mangal Ram Ahir, on the 9th of May, and the other Musammat Sheorania on the 10th of May. This is what we learn partly from the evidence of Mangal Ram and Musammat Sheorania partly from the statement made by Sarju and partly from the police evidence, and it represents in the main case presented to us here with great care by Mr. Ross Alston who appeared for the Crown. A great deal of evidence was produced at the trial but the only evidence upon which the learned Sessions Judge has acted is the evidence of these two witnesses, Mangal and Sheorania, together with certain other evidence bearing upon an intrigue between Ram Jiawan and Musammat Shama as supplying the motive for the murder. The learned counsel who appeared for the Crown took with one exception the same view of the evidence as

did the learned Judge, and we have, therefore, only to consider how far this evidence establishes the guilt of the accused. That exception was that he pressed us to consider the statement of Sarju on the 1st of May, 1908, as against the other three convicts who were tried along with him. This the learned Sessions Judge refused to do. All this evidence was very rigorously attacked by the learned Counsel who appeared for the defence. The following objections were raised to the consideration of Sarju's statement both as against the three appellants Thakur Parshad, Kandhai and Sultan, and as against Sarju himself. It was objected (1) that the joint trial of all the four accused was illegal, (2) that the statement had been made under an invalid tender of pardon and could not, therefore, be used in any way, (3) that it was a statement caused by inducement and therefore inadmissible in evidence under section 24 of Act No. 1 of 1872 and that it was not corroborated. The learned Vakil for Sarju took one further objection to this effect that the statement bore internal evidence of having been a statement taught to Sarju and not one which Sarju would have made for himself. He pointed to the commencement of it as being quite unnatural. If we considered that it was made by an ordinary *kahar*, he pointed out, that it does not account for the two circular shape wounds which were on the back of Musammat Kas-turia's head, and that in fact it contains nothing more than what the police, on the 1st of May, either knew or could have easily inferred as to the manner in which the murder was probably committed. It does not, for instance, he added, explain how the murderers effected their entrance or other minor and important details upon which we are still in the dark and which Sarju could and should have explained if he told the whole truth. We have examined the statement made by Sarju very carefully. It is a statement made by an accomplice, and we find that Sarju is at great pains to minimise the share he took in the murder. For this reason alone we should be and are most unwilling to act upon it so far as the appellants other than Sarju are concerned. We shall presently show that though it appears to be corroborated by the evidence of Mangal Ram and Musammat Sheorania it is not so in fact. (There are interesting points upon which we

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would have given our judgment but which under the circumstances do not press for decision). This being the case we need not consider the various points taken by the learned Counsel for the three appellants. We need only consider the objections raised against the statement by the learned Vakil who appears for Sarju. So far as Sarju himself is concerned it has not been shown that he has been in any way prejudiced by having been tried with the other accused. There is no provision of law in the Criminal Procedure Code which lays down that an approver to whom pardon has been tendered and who does not fulfil the condition upon which the pardon was tendered shall not be tried at the same trial with the other accused in the case. Great stress has been laid upon the argument that unless a tender of pardon has been made according to law and the pardon withdrawn according to law, the statement made by an accused person under the influence of the pardon tendered cannot be used against him. Reliance was placed in support of this argument upon the case—*Queen Empress v. Chidda* (1). This was a case in which a Magistrate of a District who had no jurisdiction either to inquire into or to try the offence tendered a pardon and examined as a witness the person to whom he had tendered pardon with reference to a dacoity committed in another district. It was held that under these circumstances the court of sessions to which the accused were eventually committed was right in ignoring the pardon. It is sought to apply the precedent of that case on the ground that Mr. Moore when he recorded the statement made by Sarju on the 1st of May, was not empowered under section 337 of the Code of Criminal Procedure to tender a pardon to Sarju. He was not at that time the Magistrate enquiring into the offence and he had no power to make the tender of pardon except with the sanction of the District Magistrate. We sent for Mr. Moore and examined him as a witness in the case, and we find that as a matter of fact he did before granting the pardon to Sarju obtain the express sanction of the District Magistrate of Allahabad. It is true that that sanction was not reduced to writing and it would have been far better that it had been made the subject of a written order. We

(1). [1897] I. L. R., 20 All., 40.

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call the attention of the learned Magistrate to the provisions contained in sub-section IV of section 337 of the Code of Criminal Procedure, and we call the attention of both the District Magistrate and the learned Magistrate to what was held by this Court in the case of *Empress of India v. Asghar Ali* (2). These are very salutary provisions and the neglect of them may easily lead to great difficulties and even go so far as to prevent an appellate court from considering statements made by an approver under promise of pardon not duly made especially if any suspicion arises of prejudice having been caused thereby to the particular person concerned. At the same time we are fully satisfied in this case from the evidence given by Mr. Moore that he did obtain the sanction of the District Magistrate before making any tender of pardon to Sarju. We are also satisfied that the mere absence of a written record of the reasons for tendering the pardon and of the sanction of the District Magistrate could not have prejudiced Sarju; the irregularities in the case are irregularities which fall within the provisions of clause G of section 529 of the Code. We hold that in the present case the tender of pardon was made in accordance with law, and that the statement made by Sarju can be given in evidence against him seeing that the pardon tendered to him has been forfeited. It is clear to us that the argument based upon the provisions of section 24 of Act No I of 1872 is not entitled to weight in the present case. Clause II was no doubt introduced into section 33 of the Code in order to make it clear that a statement made by a person who accepted an offer of pardon is not governed by section 24 of Act No I of 1872, and can be used against him in evidence when that pardon has been forfeited. There remains the contention that the statement made by Sarju is manifestly one taught him by the Police, and is not one made by him of his own free will and accord. With regard to this objection, we have it in evidence that the statement was first made in some form or another to the Police and it is both possible and probable that part of it is the result of questions put to Sarju by the Police which helped him to reduce the statement into the order and form in which it now appears. We see no reason to infer that that part of

(2) [1880] I. L. R. 2 All., 260.

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the statement which gives the account of circumstances immediately connected with the murder is due to any Police tuition or to suggestion made by any one from outside. We think that it is natural, it is full of details, it is in accordance with the medical evidence with the one exception of the two circular wounds found on the back of the neck of Musammat Kasturia. We do not find from the medical evidence that these wounds were very severe wounds and it may well be that Sarju thought them of little importance as compared with the heavy blows from the chopper which naturally would impress themselves more strongly upon his mind. When Sarju made his statement he was particularly asked whether he had been beaten, tortured, bribed, kept awake or tutored by the Police, and his answer to each of these questions was an emphatic denial. There seems no reason to doubt the statement made by Murshid Ali Khan that Sarju did not come under his influence until the 29th of April. The statement was recorded on the 1st of May, and there was little time for its being drilled into the mind of Sarju if it was a pure invention and relates to facts of which Sarju was not an eye-witness. After Sarju made his statement he was confined in the jail lock-up and never came under the control of the Kotwal. It is true that on the 15th of May he says that he knew nothing about this murder and had nothing to do with it. The reasons he gives for withdrawing from the statement previously made are some of them clearly false and the rest of them are not in any way convincing.

We now come to the statements of Mangal Ram and Musammat Sheorania. Those statements may be perfectly true statements in many particulars, but even, if we accept them as they stand they do not carry the case any further than this that the four accused were seen coming out of the house on the day on which and close about the time at which the murder had been committed. Both these witnesses agree that they noticed no stains of blood on the persons or clothes of any of the four accused. Looking to the terrible wounds inflicted, the person who inflicted them could not have got away without tell tale marks of what he had done. Mangal Ram says that the men came out without any agitation and walked off slowly. There is also the great difficulty about the time to which these witnesses depose. Both of them

have the same moment of time in their minds, for Musammat Sheorania says that when she saw the four men coming out she also saw Mangal Misir, the other witness coming out of the latrine. Mangal fixes the time when he saw the four men coming out as being 3 p. m. In two other statements made previously he puts the time at 2 o'clock and again at 7 o'clock. It is evident that we cannot accept his statement as regards the time with any degree of confidence. If the time mentioned by him in the Court of Sessions is correct, the murder must have been considerably previous to the time he says that he saw the four men coming out of the house. In one of the statements previously made by him, Mangal Ram says that at the time when he saw the four men coming out of the house there were "pachason admi" coming and going, and if this be true it is quite possible that the four men if they were there, were sight-seers attracted by the news of the murder. The difficulty then is that this evidence falls short of the point to which it should have reached if we might have accepted as conclusive of the guilt of the appellants other than Sarju. It is circumstantial evidence and such evidence is incomplete unless it is exhaustive and shuts out any other possible conclusion or inference. There is a further difficulty about accepting this evidence; it is the evidence of servants made after the arrest of their master and after the arrest of other servants who stand charged with the commission of the murder, and we do not know what influence this may not have had upon the minds of these two witnesses.

A great deal of the evidence in the case bears upon the supposed intrigue between Ram Jiawan and Musammat Shama. The learned Counsel who appeared for the appellants drew our attention to a number of improbabilities from which he asked us to doubt whether any intrigue at all existed between these two persons and added that even if it did exist the improbability of Musammat Shama going by day with her face exposed to the house of Ram Jiawan and of her acting in the shameless way that she is said to have acted in full view of the windows belonging to the Zenana of Badri Pershad was so great that we ought not to accept the story told as having any truth. There is on the whole a great deal

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of improbability and we feel we cannot act upon it. Notwithstanding the denial of the two principal actors in this intrigue, it is possible that the intrigue did exist but the difficulty remains that any evidence that could be brought in support of this must be like the present evidence open to objection. The intrigue would be carried on with more or less secrecy, and it would be difficult to obtain evidence in support of it except the evidence of persons like Chhutia, the daughter of the procuress and a member of Badri Pershad's house-hold and like Chhangan. Chhangan is clearly a liar and a practised liar and no confidence can be reposed in any thing he says. All that one can accept of his statement is that he lived in the same house as Musammat Shama Bibi, and would have opportunity of knowing of the intrigue. The result is that we have no alternative but to give the benefit of doubts which arise out of the case to Kandhai, Thakur Pershad and Sultan Khan. We allow their appeals, set aside the conviction and sentences, find them not guilty and direct that they be forthwith released.

In the case of Sarju, we have his own statement made upon oath to the effect that he took part in these brutal murders. Although we have carefully examined all that has been said on his behalf by Mr. Satya Chandar, there is no reason to doubt the truth of that statement. Though we are unable for the reasons stated above to take that statement against the other appellants, it is sufficient to establish that whoever the other murderers may have been Sarju was a willing and active abettor in these murders. We see no reason to interfere with either the conviction or the sentence. We confirm the conviction and the sentence, and direct that the latter be carried out according to law.

*Order modified.*

## PRIVY COUNCIL.

KALKA PRASAD AND OTHERS

versus

MATHURA PRASAD AND OTHERS.

*Admission in court—Estoppel—Indian Evidence Act (1 of 1872), section 32 (5)—Ante litem motam—Pedigree—Hindu Law—Mitakshara—Inheritance—Samanodaka—Sister's son.*

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LORD ROBERTSON.  
LORD ATKINSON.  
LORD COLLINS.  
SIR A. SCOBLE.  
SIR A. WILSON.

Where the plaintiffs had adduced oral evidence in support of certain pedigrees filed by them in the first Court, and got a decree from that Court on the basis of their evidence, but at the hearing of a first appeal against that decree were said to have made "practically no attempt to support the finding of the Subordinate Judge," held in view of all the circumstances that the plaintiffs were not estopped from endeavouring to sustain that finding upon further appeal to the Privy Council.

Where pedigrees are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but are documents drawn up on a particular occasion for a specific purpose by members of the family, they must be treated as mere declarations made by the persons who respectively drew them up or adopted them.

In order to make a declaration, made or adopted by a deceased member of a family touching the family reputation or tradition on the subject of its descent, inadmissible on the ground of having been made *post litem motam*, the same thing must be in controversy before and after the statement is made. *Freeman v. Phillips*, 4 M. & S., 486; *Shrewsbury Peerage*, 7 H. L. C. 1; *Duke of Devonshire v. Neill*, 2 Ir. L. R., 132, referred to.

Where the question was as to inheritance to the estate of one G deceased, who was a Hindu governed by the Mitakshara, and the plaintiffs proved that their father and the deceased were descended from one common ancestor, both being only seven degrees removed from that ancestor, held that the plaintiffs were entitled to succeed as against the sister's son.

APPEAL against a decree of the Court of the Judicial Commissioner of Oudh.

The material facts will appear from the judgment.

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MATHURA PRASAD*L. De Gruyther, K. C.*, for the appellants.*G. E. A. Ross*, for the respondents.

The judgment of the Lords of the Judicial Committee was delivered by

*Lord Atkinson.*

LORD ATKINSON.—The suit out of which this appeal arises was instituted by the appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immoveable property in the plaint described, of which Gur Sahai died possessed about 40 years ago.

Gur Sahai was succeeded in the possession and enjoyment of the property by his widow, Musammat Parbati, who died on the 22nd March, 1896. Sheo Sahai died on the 22nd September, 1899.

The principal defendant, the respondent Mathura Prasad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Musammat Parbati, still retains it, and succeeded in obtaining a mutation of names in his own favour.

Only two questions were discussed on the hearing of the appeal, and it is only necessary for its decision that their Lordships should deal with these. They are :—

1. Is it open to the plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu Law, the heirs of Gur Sahai?
2. If it be open to them to do so, is the evidence, legally and properly admissible, given before the Subordinate Judge, who tried the case in the first instance, sufficient to establish the fact of their alleged heirship?

The course the proceedings took before the Court of the Judicial Commissioner is somewhat peculiar. The plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that the plaintiffs were, through Sheo Sahai,

heirs of Gur Sahai. Mathura Prasad filed a pedigree which showed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das, that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree; and he contended that, under the Hindu law, heirships did not extend beyond the 14th degree, and that therefore he (Mathura Prasad), though only a sister's son, was to be preferred as heir to such remote relations.

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No evidence whatever was given to prove the latter pedigree. Indeed it was abandoned by the respondents on this appeal. Yet the Court of the Judicial Commissioner, finding that it showed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu law permitted them, notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the defendants Nos. 1 and 2 applied under section 623 of the Civil Procedure Code for a review of this judgment, setting forth amongst other things :—

1. That the Court had held that the pedigrees set up by the plaintiffs were not proved, and that they were therefore not exclusively entitled to the property in suit.

2. That the question whether persons in the 16th degree could be preferred to Mathura Prasad, the nephew, was not allowed by the Court to be fully argued.

On this application the Court of the Judicial Commissioner decided that the Hindu law forbade, what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor, on the ground that he could scarcely be said to be a relation at all and that therefore the nephew Mathura Prasad should be considered as nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application, made no reference to the first point which



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they had decided, *vis.*, that the pedigree set up by the plaintiffs was not proved.

In the first judgment of the Court they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal, had been challenged by the defendants' advocate, who contended that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the Lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the evidence, written and oral, adduced by the plaintiffs, giving their reasons for holding that the documents were inadmissible, and the witnesses unworthy of belief, and they wind up this examination with the passage on which the respondents rely as sufficient to shut out the plaintiffs from attempting to sustain the decision of the Subordinate Judge. It runs as follows :—

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant, Mathura Prasad, the plaintiffs are heirs of Gur Sahai, as according to it they are *Samanodakas* ; and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the plaintiffs' advocate had formally admitted he could not support that Judges' finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding on nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought to recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the plaintiffs, is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the plaintiffs are by the statement contained in this paragraph estopped from endeavouring to sustain, on this

appeal, the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely, (1) a pedigree purporting to have been written by one Maharaj Bahadur in 1872 ; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from the lands sued for in this action, in which Sheo Sahai was plaintiff and Kesho and others defendants ; (3) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shankar Sahai (the son of the second defendant) was plaintiff, and Fazal Husain and others were defendants. The Subordinate Judge, though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this appeal has arisen is but a stage in the dispute which arose on the death of Musammat Parbati in 1896, admitted each of these pedigrees in evidence, and the plaintiffs relied strongly upon them. They are not ancient family records handed down from generation to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them in the reverse order, the last is inadmissible, having been made *post litem motam*. The second is endorsed : “(Signed) Sheo Sahai, plaintiff, by the pen of Sundar Lal, Special Agent,” and is on the evidence of Sundar Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Musammat Parbati in the absence of Sundar Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting-place, she had said :—“I have no kinship with him, nor am I on visiting and dining terms with him, as a fellow-caste-man. He has no concern with my proprietary interest (*hakkiat*). . . . The plaintiff's [Sundar Lal's] father, and his co-sharers have

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wasted their shares in the *hakkia*." But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement inadmissible on this ground, the same thing must be in controversy before and after the statement is made—*Freeman v. Phillips* <sup>(1)</sup>, *Shrewsbury Peerage* <sup>(2)</sup>. *Duke of Devonshire v. Neill* <sup>(3)</sup>. In their Lordships' opinion, having regard to the evidence of Sundar Lal and of the other witnesses examined for the Plaintiffs, this pedigree was clearly admissible.

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiffs' family, who was however not examined as a witness. According to the evidence of Kalka Parshad, it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894—1896 (the precise date is not fixed) as a statement of the family descent for the purpose of being given in evidence in certain criminal proceedings instituted under section 323 of the Indian Penal Code in the case of *In re Baiju and others v. Sundar Lal and Durga Prasad*. It was thus adopted by Sheo Narain, is not shown to have been made *post litem motam*, and is therefore, in their Lordships' opinion admissible.

These pedigrees disclose that Gur Sahai and Sheo Sahai are descended from a common ancestor, Partab Mal, one of the sons of Chajmal Das, the first through his son Har Prasad, the second through his son Ram Ghulam, each being six degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely, Kalka Prasad, Mohabbat Rai, and Sundar Lal, prove pedigrees, substantially identical with that signed by Sheo Sahai filed in 1892 or 1894, and others, such as Hazari Lal, prove important portions of it; while Lalta Prasad, one of the defendants' witnesses, deposed as follows:—

"Sheo Sahai also belongs to the family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion both [*i.e.*, Madho Ram and Sheo Sahai] are equally related, *i.e.*, in the same degree."

(1) [1816] 4 M. & S. 486, 494, 497.

(2) [1851] 7 H. L. C., 1, 22.

(3) [1876-77] 2, Ir. L. R., 132.

And Sri Kishen, another witness for the defendants, a priest of the family of Sita Ram, deposed :—

“Sheo Sahai and Sheo Narain descend from Ram Ghulam, Gur Sahai descends from Har Prasad ; Ram Ghulam , Har Prasad, and Shiam Das are sons of Partab Mal.”

This evidence precisely accords with the above-mentioned pedigrees numbered 1 and 2, proves, in fact, some of the most important steps in them and is therefore, the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain Mohalla Sarai has been enjoyed. The family reputation is that this Sarai was founded by Sundar Das (one of the brothers of Partab Mal), who died childless. If the pedigrees of 1872 and 1894 be correct then half, or an 8-annas share in this Sarai should be found in the enjoyment of the descendants of Partab Mal and the remaining 8-annas share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That, according to the evidence of Raghunath Prasad and Kalka Prasad, is precisely what is found. Two-annas shares were enjoyed by Sheo Sahai, Sheo Narain and Gur Sahai respectively ; a 2-annas share by Sheo Dyal and Ram Dyal (who died childless) jointly, and the remaining 8-annas by Sita Ram, Gur Prasad, Ram Narain, Shankar Sahai, and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the defendants from Shiam Das and not from Partab Mal, the whole 8-annas share of Partab Mal must, in the events which have happened, have come to Musammat Parbati. Sita Ram, one of the defendants, gives in detail the distribution of an 8-annas share in the Sarai coming into the hands of his branch of the family and states that the Sarai is joint property. No evidence is given to contradict that of Raghunath Prasad and Kalka Prasad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.

It was argued by Mr. Ross, on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up

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the first pedigree, as deposed to by Kalka Prasad. No doubt there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its decrees should therefore be reversed with costs, and this appeal allowed. They will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

*Messrs. Young, Jackson, Beard & King*, solicitors for the Appellants.

*Messrs. T. L. Wilson & Co.*, solicitors for the first and second Respondents.

*Appeal allowed.*

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*July, 28.*STANLEY, C. J.  
BANERJI J.

## HIGH COURT.

PARSANNI

*versus*

GHAREEB DAS.\*

*Will, construction of—Intention—Inappropriate words—"Cash"—Mortgage bonds.*

In construing a will what the court is concerned with is to ascertain the intention of the testator, and if it finds that he intended that all his moveable property should pass to the legatee, it should not hesitate to carry out the testator's intention even though he used an inappropriate word such as "cash."

No absolute technical meaning should be given to such a word as "money."

*Cadogan v. Palagi*, L. R., 25 Ch. D., 154, and *Chheda Lal v. Gobind Ram*, ante, 519, referred to.

SECOND APPEAL against the decree of H. Dupernex Esqr., District Judge of Saharanpur, reversing a decree of Babu Girdhari Lal, Subordinate Judge.

\* S. A. No. 1032 of 1907.

Suit for declaration of right.

Question as to the construction of a will, which ran thus :—

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Whereas I have no male or female issue, nor is my wife alive now and there is very little hope of life, I therefore with my own free will and in possession of sound body and mind bequeath the property detailed below and all sorts of house-hold goods such as ornaments, cash, utensils &c., now existing, which are my exclusive and self-acquired property, with all the rights appurtenant thereto to Musammat Parsanni, wife of my deceased son Purbhulal and to my cousin Gharib Das, minor son of Pandit Bhan Datt deceased, whom I am maintaining and whom I have got married, in this way, that I shall remain in proprietary possession and enjoyment of all the moveable and immoveable property during my life-time, with all the powers of alienation &c., that after my death, Musammat Parsanni and Gharib Das will be the owners and possessors ; that they will have all the proprietary powers and powers of transfer &c., by way of sale and mortgage &c., in respect of the property bequeathed.

Therefore I have bequeathed to Musammat Parsanni and Gharib Das the house-hold goods and the property owned and possessed by me exclusively which I have got now or whatever property I may acquire in future. And whatever property moveable and immoveable of Musammat Parsanni shall remain after her death, Gharib Das will be its owner.

Detail of property bequeathed to Musammat Parsanni, situate a Saharanpur, Mohalla Dina Nath, and all cash, ornaments and utensils.

1. One house facing the south &c.
2. One entire double storied shop &c.

Detail of the property bequeathed to Gharib Das, minor, situate at Saharanpur, Mohalla Dina Nath, but Musammat Parsanni will continue to live in those buildings during her life-time, and Gharib Das shall have no power to turn her out.

The court below dismissed the suit.

Plaintiff appealed.

*Sundar Lal* (with him *S. C. Banerji*), for the appellant.

The intention of the testator clearly was to leave everything to the appellant save some specified house property. Money that subsequently to the execution of the will was invested in mortgage securities would still be money within the meaning of the bequest here.

Reference was made to

1. *Jarman on Wills*, 722.

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*Chheda Lal v. Gobind Ram*, [1902], F. A. No. 110 of 1899, decided on 5th April, 1902, since reported, *ante* 519.

*M. L. Agarwala*, for the respondent.

*Zar nakd* means cash, and 'cash' has never been interpreted to mean anything but ready money.

*Beales v. Crisford*, [1843], 13 Sim., 592.

He also referred to the Indian Succession Act, section 139.

*Sundar Lal*, in reply, submitted that the doctrine of ademption was limited to cases of specific legacy. Here the bequest was of a general character.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—In this appeal we have to interpret the will of one Salig Ram, who died without issue, his only son having predeceased him. The plaintiff appellant is the widow of that son and the defendant respondent Ghareeb Das is a distant relative of the deceased. In his will the testator bequeathed his property 'detailed below' and also all sorts of house-hold goods, such as ornaments, cash, utensils, *et cetera*, then in his possession to Musammat Parsanni and Ghareeb Das, and then the will proceeds to direct that the executant, shall remain in proprietary possession and enjoyment of all the moveable and immoveable property during his life, and that after his death, Musammat Parsanni and Ghareeb Das will be the owners, and as such entitled to possession with powers to deal with the property as absolute owners. Then follows this passage "therefore I have bequeathed to Parsanni and Ghareeb Das the house-hold goods and the property which is at present in my possession and which is exclusively mine, and also whatever property I may acquire in future." Then follow two other bequests with which we are not concerned. There is a schedule attached to the document giving details of the property bequeathed to Parsanni and Ghareeb Das respectively. In the detail of property bequeathed to Musammat Parsanni, we find "all cash, ornaments, utensils included and also two houses." In the detail of property bequeathed to Ghareeb Das a house situated in Saharanpur is mentioned and some *Kothas* in a house described as facing the south; but as regards this bequest, there is a provision that Musammat Parsanni should

continue to occupy the buildings during her life and that Ghareeb Das should have no power to turn her out. The testator after the date of the execution of this will, invested some money on the security of mortgage bonds, and it is the title to these mortgage bonds which is now in dispute. The plaintiff claims to be entitled to them under the bequest in the will made to her, whilst the defendant on the other hand alleges that there was an intestacy as to them, or that at least he is jointly entitled to them.

The court of first instance held that the plaintiff was entitled to succeed and in its judgment gives excellent reasons for so holding.

The learned District Judge, however, upon appeal reversed the finding of the court below holding that as regards the bonds under the last mentioned bequest in the will, the plaintiff and the defendant became jointly entitled to them.

Now if there is one thing clear on perusal of this will it is that the testator intended to dispose of the entire of his property. In holding that there was no intestacy, it is not necessary for us to rely upon the well-established rule that the court always leans against intestacy. The will so clearly shows that the testator meant to dispose of the entire of his property, that it is unnecessary to rely on that rule. Not merely does he deal with all his property of which he was possessed at the date of his will, but as appears at the end of the will all property which he might acquire in future.

Then the only question for determination is whether the bonds in question which were obtained as security for the money advanced by the testator in his lifetime passed under the will to his daughter-in-law. In the earlier part of the will he bequeathes his property to the two legatees as *detailed below*, including all sorts of house-hold goods such as ornaments cash, utensils *et cetera*. Then after reserving to himself a life estate, he gives not merely that property but all future acquired property to the two legatees without the words "detailed below." It appears to us clear that the intention of the testator was that the property so disposed of should pass to those legatees in the manner detailed in the schedule. Turning to the schedule, it is perfectly obvious that the bonds

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in question were not intended to pass to Ghareeb Das. Only some rooms in a house and a house situated in Saharanpur were given to him. Unless therefore the testator died intestate as to the bonds in question they must pass under the bequest to his daughter-in-law. The words in which the gift to her is made are very general and seem to us to be comprehensive enough to include all the property, which is described in the body of the will as ornaments, cash, utensils *et cetera*. True it is that the words *et cetera* do not appear in the detail of property but it was we think intended by the testator that all moveable and immoveable property of which he was or should be possessed should pass under the gift to Musammat Parsanni. It was strenuously argued by the learned counsel for the respondent that mortgage bonds would not pass under the word cash, but we are not disposed to accede to that contention. What we are concerned with is to ascertain what was the intention of the testator, and if we find that he intended that all his moveable property should pass to the legatee, we should not hesitate to carry out his intention even though he used an inappropriate word such as 'cash.' We are supported in this view by the ruling in *Cadogan v. Palagi* <sup>(1)</sup>. In that case a bequest of money of which the testator was possessed was held to include all his personal estate, including securities, furniture and effects: KAY, J., held that in construing a will no absolute technical meaning should be given to such a word as "money." In an unreported case of *Chhedu Lal v. Gobind Ram*, decided by a Bench of this Court of which one of us was a member, on the 5th of April, 1902, namely, F. A. No. 110 of 1899 <sup>(2)</sup>, it was held that the word *rupia*, carried to the legatee all the property (*tarka* and *jaidad*) of which the testator died possessed. We think therefore that the decision of the learned Subordinate Judge was correct, and that the lower appellate court was wrong in reversing that decision. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts, including fees in this Court on the higher scale.

*Appeal allowed.*

(1) [1883] L. R., 25 Ch D., 154.

(2) Since reported. 5 A. L. J. R., 519.

## KEDAR SINGH AND OTHERS

*versus*

## .MATABADAL SINGH AND OTHERS.\*

*Suits Valuation Act (VII of 1887), section 8—Value of a suit for redemption—Market value—Principal amount—Appeal from an order of Subordinate Judge.*

The value of the subject matter of the suit in a redemption suit is not the market value of the property but the amount of the mortgage money. In a suit for redemption where the principal amount of mortgage was Rs. 1,000, *held*, that the suit was cognisable by a Munsif and an appeal lay to the District Judge from an order of the Subordinate Judge returning a plaint for presentation to the proper Court. Section 8 of the Suits Valuation Act does not affect the law laid down in *Kubair Singh v. Atma Ram*, I. L. R., 5 All., 332, and *Amanat Begam v. Bhajan Lal*, I. L. R., 8 All., 438.

FIRST APPEAL from an order of Maulvi Tajjammul Husain, Subordinate Judge of Jaunpur.

Suit for redemption.

The plaintiffs valued their claim at Rs. 9,000 for the purposes of jurisdiction but the principal amount being Rs. 1,000, they paid court-fee on that amount. The Subordinate Judge held that the suit was cognisable by the Munsif and returned the plaint for presentation to that court. The plaintiff appealed to the District Judge, who set aside the order of the Subordinate Judge. To make their position safer they filed an appeal from the same order to the High Court.

*W. Wallach*, for the respondents, raised a preliminary objection to the hearing of the appeal on the ground that the valuation being only Rs. 1,000 an appeal lay to the District Judge whether the suit was cognisable by the Subordinate Judge or the Munsif. He referred to section 589 of the Code of Civil Procedure.

*Gokul Prasad*, for the appellant, submitted that in cases for redemption the valuation for purposes of court-fee and jurisdiction was not the same (*vide*, section 8 of the Suits Valuation Act VII of 1887) and as the suit was virtually one

\* F. A. F. O. 34 of 1908.

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November, 3.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

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for possession of immoveable property the value of the property determined jurisdiction and an appeal lay to the High Court. The old cases in 5 All., 332 and 8 All., 438 no longer have the force of law since the passing of Act VII of 1887.

The judgment of the Court was delivered by

AIKMAN, J.—This is an appeal from an order of the learned Subordinate Judge of Jaunpur returning a plaint to the appellants for presentation in the court of the Munsif. The suit was one for redemption of a mortgage, the amount secured by the mortgage being Rs. 1,000. In the plaint it is stated that the value of the property is Rs. 9,000. The learned counsel for the respondents takes a preliminary objection based on section 589 of the Code of Civil Procedure, namely, that the appeal does not lie to this Court, but to the Court of the District Judge. This preliminary objection really raises the issue as to whether the plaintiff's suit was cognizable by the Munsif or by the Subordinate Judge. If the "value" of the suit is to be taken to be the amount secured by the mortgage then under section 19 (1) of Act No. XII of 1887 the plaint should have been filed in the Court of the Munsif and the action taken by the Subordinate Judge in returning it is right. In the case of *Kubair Singh v. Atma Ram* (1), it was held by STUART, C. J., and TYRELL, J., that the value of the subject matter of a suit like the present was not the market value of the land, but the amount of the mortgage money. In the Full Bench case, *Amanat Begam v. Bhajan Lal* (2), a similar view was taken. The learned vakil for the appellants contends that having regard to the provisions of section 8 of Act No. VII of 1887, an act which was passed after the rulings referred to, those rulings are no longer law. That section provides that in suits other than those referred to in the Court Fees Act, section 7, paragraph ix, where court fees are payable *ad valorem* under the Court Fees Act, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. One of the kinds of suits referred to in paragraph ix of section 7 is a suit against a mortgagee for the property mortgaged. The present suit is one of that nature. But the section of

(1) [1883] I. L. R., 5 All., 332.

(2) [1886] I. L. R., 8 All., 438.

the Suits Valuation Act relied on by the appellant's learned Vakil does not prescribe what is to be taken as the value of a suit for redemption. This being so, we think that the section relied on does not affect the rulings to which we have referred above. We must therefore sustain the preliminary objection. We direct that the memorandum of appeal be returned to the appellants for presentation in the proper Court. The respondents are entitled to their costs in this court including fees on the higher scale.

X. *Preliminary objection allowed. Appeal dismissed.*

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ALI AHMED

*versus*

MUHAMMAD OWAIS KHAN.\*

*Limitation Act (XV of 1877), Art. 141—Mahomedan widow out of possession—Suit within 12 years after her death—Limitation.*

G died leaving a widow B and a brother N. B obtained possession in lieu of dower but shortly after lost it and her suit for possession was also dismissed. The defendants remained in possession for over 12 years. Within 12 years of B's death but more than 12 years after her dispossession the heirs of B brought this suit for possession. *Held*, that the suit was barred by limitation. The suit would have been in time only if B had remained in possession till her death. *Hashmat Begam v. Mazhar Husain*, I. L. R., 10 All., 343; and *Azam v. Faizuddin*, I. L. R., 12 Cal., 594, referred to.

FIRST APPEAL from an order of W. F. Kirton, District Judge of Moradabad, reversing a decree of Babu Kauleshar Nath Rai, Munsif of Amroha.

Suit for possession and mesne profits.

Ghaziuddin, the owner of the property in suit died in 1885 leaving his widow Musammat Bashirunnissa and his brother Niazuddin him surviving. The plaintiff and the defendants respectively represent Bashirunnissa and Niazuddin Khan. The plaintiff states that Niazuddin relinquished his right in his favour; that the widow remained in possession of the

\*F. A. F. O., 32 of 1908.

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1908.

KEDAR SINGH

*v.*

MATABADAL  
SINGH.

*Aikman, J.*

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1908.

*November, 3.*

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

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1908.

ALI AHMAD

v.

MUHAMMAD

OWAIS.

property in lieu of her dower up to the date of her death in 1906, when the defendant took wrongful possession. The defendant denied that Ghaziuddin was the owner or that his widow was ever in possession, and contended that the suit was barred by time. The Munsif dismissed the suit holding that the suit was barred by limitation and that Bashirunnissa had not remained in possession till her death. The lower appellate court reversed that decree and remanded the case under section 562, Code of Civil Procedure.

*Muhammad Ishaq* (with him *Shafi-uz-zaman*) contended that article 141, schedule II, Limitation Act, did not apply where a Mahomedan widow was in possession in lieu of her dower for Mahomedan law knew nothing about reversioners. He relied upon

*Hashmat Begam v. Mazhar Husain*, [1888] I. L. R. 10 All., 343.

*Azam Bhuyan v. Faizuddin*, [1886] I. L. R. 12 Cal., 594.

*J. Simeon*, for the respondents, replied.

The judgment of the Court was delivered by

*Aikman, J.*

AIKMAN, J.—This appeal arises out of a suit for possession of certain immoveable property and mesne profits. The property at one time belonged to Ghaziuddin who died in 1885. The plaintiffs are the representatives in interest of Ghaziuddin's sisters, who were entitled as heirs to a portion of his property. When Ghaziuddin died, his widow Musammat Bashir-un-nissa got possession of it in lieu of her dower. But shortly after Ghaziuddin's death she somehow lost possession of the property in suit which was taken possession of by the father of the appellant Sayid Ali Ahmad. In 1891 Bashir-un-nissa brought a suit against the defendant for possession of the property. That suit was dismissed on the 5th of February, 1892. The present suit was filed on the 29th of July, 1907. The court of first instance held that the suit was barred by the defendant having held adverse possession of the property for upwards of 12 years. On appeal the learned Additional Judge applying article 141 of the Limitation Act, held that the suit was within time and remanded the case to the court of first instance under section 562 of the Code of Civil Procedure for disposal on the merits. Against this order of remand the present appeal has been preferred. In our

opinion the appeal must succeed. The widow Musammat Bashir-un-nissa died in 1906. Had the property remained in her possession in lieu of dower, the plaintiffs' suit would have been within time. But it appears to us that when she lost the possession, which she had in lieu of dower, there was nothing to prevent the plaintiffs or their predecessors in title from at once suing to recover their share of it. As they have allowed the defendant to remain in possession of it for upwards of 12 years, it appears to us that their suit is barred. We agree with the view expressed by the court of first instance. The decisions in *Hashmat Begam v. Mazhar Husain* (1), and *Azam Bhuyan v. Faizuddin Ahmad* (2) are also in the appellant's favour. We allow the appeal and setting aside the order of the lower appellate court, restore the decree of the court of first instance. The appellant will have his costs here and in the court below.

*Appeal allowed.*

(1) [1886] I. L. R., 10 All., 343. (2) [1888] I. L. R., 12 Cal., 594.

## FULL BENCH.

SADARUDDIN AHMAD AND OTHERS

*versus*

CHHAJJU AND OTHERS.\*

*Registration Act (III of 1877), section 17 cl. (b)—Variation of terms of registered deed—Evidence Act (I of 1872), section 92—Compromise in mutation proceedings—Varying the terms of registered deed—admissibility of.*

A mortgage was executed by one mortgagor on condition that the property could not be redeemed within 25 years. In the Revenue court a co-owner of the mortgagor objected to mutation of names. The matter was compromised, the condition being that the objector withdrew his objections and the mortgagees, names were entered in the revenue registers and it was provided that the mortgage could be redeemed in *Jeth* of any year. In a suit for redemption brought within 25 years, *held*, that the compromise could not be admitted in evidence inasmuch as it purported to modify the terms of the registered mortgage, and that the terms of a registered deed of mortgage could not be varied except by a registered instrument.

\* S. A. No. 1332 of 1907.

CIVIL

1908.

ALI AHMAD

*v.*

MUHAMMAD

OWAIS.

*Aikman, J.*

CIVIL.

1908.

*November, 9.*

STANLEY, C. J.

BANERJI, J.

RICHARDS, J.

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1908.

SADARUDDIN

AHMAD

v.

CHHAJJU.

SECOND APPEAL against the decree of Pandit Soti Raghubans Lal, Additional Judge of Meerut, reversing a decree of Babu Rama Das, Munsif of Muzaffarnagar.

Suit for redemption of a mortgage.

The facts were as follows:—

One Chhajju, on August 8, 1903, mortgaged 21 bighas 12 biswas of land in Khata No. 1 to the defendants for a term of 25 years. The mortgage could be redeemed in any *Jeth* after the expiry of 25 years. The mortgagor refused to register the deed which had to be compulsorily registered. An application was made by the mortgagees for mutation of names. Chhajju, and another person Abdulla, alleging himself to be a co-sharer, objected to mutation of names. The matter was compromised and an application was put in on the 28th July, 1905, by which the objectors withdrew their objections on condition that they would be entitled to redeem in any *Jeth*. They brought this suit for redemption. The defence was that it was premature. The court of first instance decreed the suit.

The lower appellate court reversed the decree.

Plaintiff appealed.

*Abdul Raoof*, for the appellant, contended that the compromise was binding upon the parties. The objection was withdrawn only upon the ground that the mortgage could be redeemed within 25 years. The Revenue Court had power to go into the question of title and it gave effect to the compromise. It was not necessary to register a compromise put in before a court in a judicial proceeding.

*Nur Ali v. Imaman*, [1884] A. W. N., 40.

*Raghubans Mani Singh v. Mahabir Singh*, [1905] 28 All., 78.

*Pranal Anni v. Lakshmi Anni*, [1899] 22 Mad., 508, (P. C.)

*J. N. Chaudri* (with him *Motilal Nehru*), for the respondents, contended that under the terms of the original deed the mortgage could not be redeemed before the expiry of 25 years. The compromise purporting to remove that restriction should have been registered. It could not therefore be admitted in evidence.

He cited the definition of the term *instrument* from Wharton's Law Lexicon. This compromise was an instrument as it was a petition embodying the terms of an

agreement. Its registration was also compulsory under the Registration Act.

Mutation proceedings could not be called judicial proceedings. A judicial proceeding, he submitted, was one in which contested questions of right, title or liability were determined.

The Revenue Court simply effected mutation of names according to the compromise. It had no power to give effect to any of the conditions of the compromise affecting right, title, interest or liability. In other words, the Revenue Court as such could not take any judicial notice of the several terms of the compromise. It could only order mutation of names.

C. A. V.

STANLEY, C. J.—The facts of this case are these. One Chhajju executed a mortgage of certain property in favour of Husain Bakhsh and Muttu to secure a principal sum of Rs. 1,000, the mortgage being expressed to be made for a term of 25 years. In the mortgage there is a provision for redemption. This redemption clause provides that on payment of the amount due in the month of *Jeth* after the expiry of the term of 25 years the mortgage might be redeemed. The mortgagor refused to register the mortgage and thereupon an application was made by the mortgagees for compulsory registration and compulsory registration was effected. Subsequently the mortgagees applied for mutation of names in the mutation department. To this not merely Chhajju but another person named Abdulla objected. Abdulla, it will be noticed, was no party to the mortgage. He claimed to be entitled to a share in the mortgaged property and hence he objected to mutation of names, so far at least as regarded his share. The dispute was compromised, the terms of the compromise being that the whole of the property should be recorded as subject to the mortgage and that the names of the mortgagees should be entered as mortgagees in respect of it and the names of Chhajju and Abdulla as mortgagors. It further provided that the mortgagors should have power in any *Jeth* to pay the mortgage-debt and have the mortgage redeemed. The mortgagors sought redemption in pursuance of the terms of this compromise within the period of 25 years and this was refused and hence the suit for redemption out of which this appeal has arisen.

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*Stanley, C. J.*



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AHMADv.  
CHHAJJU.

Stanley, C. J.

The defence to the suit was that it was premature, having been brought within the term of 25 years.

The first court gave a decree for redemption but upon appeal the lower appellate court reversed the decree of the court of first instance on the ground that the terms of the compromise in the Revenue Court varied the terms of the mortgage and the agreement not having been registered was not admissible in evidence and could not be treated as giving the mortgagors a power to redeem contrary to the express provision of the mortgage-deed. From that decision the present appeal has been preferred and it was laid before a Bench of three Judges in view of the decision, in the case of *Nur Ali v. Imaman* <sup>(1)</sup>, the correctness of which the court before whom the appeal came was disposed to doubt.

It appears to me that the decision of the learned Additional Judge is correct. The compromise entered into in the mutation proceedings could not in my opinion have the effect of modifying or altering in any way the terms of the registered mortgage. The Revenue Court was concerned with the entry of names only and had no concern with the conditions upon which the objectors withdrew their opposition to the granting of the application for mutation. The compromise was not in fact submitted to the Revenue Court further than as showing the withdrawal of opposition to the mutation of names. The language of the order of the court shows this. The Revenue Court in view of the withdrawal of opposition simply ordered that mutation should have effect. The words are "the parties have compromised and mutation will take place accordingly." The case appears to me to be unlike that of *Nur Ali v. Imaman*. It would be fraught with danger to the security afforded to titles by the Registration Act if a compromise of parties in proceedings taken before a revenue officer for mutation of names could be regarded as having the effect which is contended for here of creating a charge and modifying the provisions of a registered document. I would therefore dismiss the appeal.

Banerji, J.

BANERJI, J.—I am of the same opinion. It is obvious from the terms of the mortgage of the 8th of August, 1903,

(1) [1884] A. W. N., 40.

that it cannot be redeemed before the expiry of 25 years from the date of it. Those terms could not be varied except by a registered instrument. By the application presented in the mutation case the Revenue Court holding mutation proceedings was merely informed of an oral contract entered into by the parties. The application itself cannot be treated as creating a fresh mortgage. Can it be taken into consideration as evidencing an alteration in the terms of the original mortgage? I agree with the learned Chief Justice for the reasons stated by him that it cannot be admitted in evidence. I think the case of *Nur Ali v. Imaman Ali*<sup>(1)</sup> is distinguishable. We were pressed with the decision in *Raghubans Mani Singh v. Mahabir Singh*<sup>(2)</sup> to which I was a party. That was a case to which in our judgment the observations of their Lordships of the Privy Council in *Pranal Anni v. Lakshmi Anni*<sup>(3)</sup> as contained in page 514 of the Report fully applied. In the present case the terms of the compromise were not referred to or narrated in the order of the Revenue Court and indeed for purposes of mutation it was not necessary to refer to the terms of the mortgage or the conditions under which redemption could take place. This case therefore is not governed by the rulings to which I have referred. I also would dismiss the appeal.

RICHARDS, J.—This was a suit for redemption of a mortgage dated the 8th August, 1903. The mortgage was a mortgage with possession and it is quite clear that according to the terms of the deed the mortgage could not be redeemed until after the expiration of 25 years. It is contended on behalf of the plaintiffs that the terms of the mortgage deed were subsequently varied by agreement between Chhajju the mortgagor and Abdulla on the one side, and the mortgagees on the other side whereby it was arranged that Abdulla should be bound by the mortgage but that the mortgage should be redeemable by payment of the mortgage debt in any year in the month of *Jeth*.

The defendants objected that such an agreement could only be proved by a duly registered document. No such document exists but the plaintiffs contend that the petition to and the

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*Richards, J.*

(1) [1884] A. W. N., P. 40.

(2) [1905] I. L. R., 28 All., 78. (3) [1899] I. L. R., 22 Mad., 508. (P. C.).

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order of the Revenue Court (referred to by the Chief Justice) operate to vary the terms of the mortgage deed and that a registered document was not necessary. I quite agree in the judgment of the learned Chief Justice and I should not deem it necessary to add anything to what he has said save for the fact that reliance was placed on the ruling in *Raghubans Mani Singh v. Mahabir Singh* <sup>(1)</sup> to which I was a party. In that case certain lands were claimed on the basis of an agreement of compromise in prior litigation whereby the title to the lands in question had been expressly admitted. The Judge had received and acted on the compromise and incorporated it into his decree. My learned colleague and I held that the plaintiffs could rely on the decree incorporating the compromise and that a registered instrument was not necessary. The facts of the present case are very different. They amount to no more than this, namely : that the Revenue Court ordered the defendants' names to be recorded as mortgagees in possession, all opposition to the application being withdrawn. The facts in the present case much more nearly approach the facts in the case of *Pranal Anni v. Lakshmi Anni* <sup>(2)</sup> in which their Lordships of the Privy Council held the unregistered deed of compromise inadmissible.

In the present case the plaintiffs in effect ask the court to hold that the petition to the Revenue Court and its order operated to create a fresh mortgage. This would be a very serious extension of the ruling of this court in *Raghubans Mani Singh v. Mahabir Singh*. I also would dismiss the appeal.

BY THE COURT.—The order of the Court is that the appeal be dismissed but under the circumstances without costs.

B. C. M.

*Appeal dismissed.*

(1) [1905] I. L. R., 28 All., 78. (2) [1899] I. L. R., 22 Mad., 508. (P. C.)

## NIAZ AHMAD

*versus*

## MANGU LAL AND OTHERS.\*

*Transfer of Property Act (IV of 1882), section 58—Deed of indemnity—Property mortgaged—Hypothecation.*

CIVIL.

1908

November, 6.

RICHARDS, J.  
GRIFFIN, J.

Certain persons sold certain property to the plaintiffs. The vendors executed a document of indemnity on the same date agreeing that if any prior lien or charge should be disclosed they would repay the whole money with interest and they hypothecated certain property to secure repayment of the purchase money. The vendees were dispossessed. In a suit to enforce the hypothecation in the document of indemnity, *held*, that there was clearly an engagement which gave rise to a pecuniary liability and that the terms amounted to a mortgage within the meaning of section 58 of the Transfer of Property Act. *Kishan Lal v. Ganga Ram*, I. L. R., 13 All., 28, referred to.

SECOND APPEAL against the decree of Babu Nihal Chandra, Subordinate Judge, confirming a decree of Babu Bans Gopal, Munsif of Bijnor.

Suit for sale.

The material facts appear from the judgment.

*Surendra Nath Sen*, for the appellant.

*Girdhari Lal Agarwala*, for the respondents.

The judgment of the Court was delivered by

RICHARDS, J.—The facts which have given rise to this appeal, are very simple. On the 4th of February, 1885, the predecessor in title of the plaintiff purchased from certain persons a certain grove. A second document bearing the same date, was executed by the vendors agreeing that if any prior lien or charge should be discovered on the property sold, the vendors would repay the whole amount of the purchase money with interest at the rate of 2 per cent per mensem from the date of the sale and it was further agreed that the vendors hypothecated certain specific property, which is specifically mentioned in the document to secure the repayment of the purchase money and interest in the event

*Richards, J.*

\* S. A. No. 480 of 1907.

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Richards, J.

mentioned. The words used are "*Makful*" and "*Mustaghanaq*." The plaintiff was dispossessed in consequence of a claim made against the property on foot of a prior mortgage. The defendant No. 1 in the events which have happened is in possession as purchaser not only of the grove sold in 1885 but also of the other property, which the plaintiff contends was hypothecated to him to secure repayment of the purchase money. The present suit has been instituted to enforce what the plaintiff contends amounts to a mortgage, namely, the document of indemnity executed on the 4th of February, 1885. The court of first instance held that the plaintiff failed to prove the deed and also that the document did not amount to a mortgage. The lower appellate court found that the deed was duly proved by the plaintiff, but that the document itself did not amount to a mortgage. The learned Subordinate Judge says that the document was not a mortgage within the meaning of section 58 (a) of the Transfer of Property Act, because it was not a transfer of an interest in specific immoveable property for the purpose of securing payment of money advanced or to be advanced by way of loan, on existing or future debt, or performance of an engagement which may give rise to a pecuniary liability. We do not think that the reasoning of the learned Judge is correct. By the agreement of the 4th of February, 1885, the vendors agreed that in certain events (which have happened) they would repay to the vendees the purchase money with interest. There was clearly an engagement which gave rise to a pecuniary liability. We have already mentioned that the property *was specifically mentioned*. In our judgment the words used to create the alleged mortgage were quite sufficient to do so. On this point we may perhaps refer to the case of *Kishen Lal v. Ganga Ram* (1) where a bench of this Court held very analogous words to be sufficient to create a mortgage. The whole intention of the document of the 4th of February, 1885, is abundantly clear and it is very difficult to see how the document does not at least amount to a charge within the meaning of section 100 of the Transfer of Property Act even if it falls short of coming within the definition of a mortgage under section 58. All the provisions of the Act as to a mortgagee

(1) [1890] I. L. R., 13 All., 28.

instituting a suit for sale of the mortgaged property are made applicable to a person having a charge. The suit has been dismissed by both the courts on a preliminary point. We allow the appeal, set aside the decrees of both the courts below and remand the suit under the provisions of section 562, Civil Procedure Code, to the court of first instance through the lower appellate court with directions to re-admit the suit on its original number in the register and dispose it of according to law. Costs will abide the event, but the appellant in the event of his succeeding will be entitled to costs in this Court including fees on the higher scale.

*Appeal allowed. Cause remanded.*

TIRBENI SAHAI AND OTHERS

*versus*

JAGANNATH.\*

*Partition—Jurisdiction of Civil and Revenue courts—Act XIX of 1873, sections 132, 241—United Provinces Land Revenue Act (III of 1901, Local), section 233 (k).*

Where the whole of a village was under partition in the Revenue court and that court directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants, for partition should consist of 12 *pattis*, but rightly or wrongly land which should have formed part of the mahal of the non-applicants was allotted to one of the other mahals, *held*, that this was a question relating to the partition or union of mahals, and the remedy of the party aggrieved was an appeal against the order confirming the partition and not a suit in the Civil Court.

*Kishen Prasad v. Kadher Mal*, 20 A. W. N., 11, distinguished.

SECOND APPEAL against the decree of B. J. Dalal Esq., Officiating District Judge of Mainpuri, reversing a decree of Babu Sushil Chandra Banerji, Munsif.

Suit for declaration of title or for proprietary possession.

The plaintiff came into court on the allegations that he and one Ganeshi Rai, father of defendants 1 and 2, were among the co-sharers in a patti of a village; that on February 17, 1881, under a partition effected between the co-sharers, their property being divided, *quras* were formed one of which being allotted to the plaintiff and another to Ganeshi Rai; that a grove also was shown in equal shares in the *quras* of the parties who had ever since been in possession of the said grove according to their respective shares; that at the attestation

\* S. A. 59 of 1906.

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*Richards, J.*

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*June, 26.*

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of the *khatauni parchas* during recent settlement proceedings the plaintiff came to know that the grove in question had been wrongly recorded in the *mahal* of the defendants in a partition held in 1893, and as he had not applied for such partition and as his *qura* was not affected by such partition, he took objections to the entry before the Settlement Court, which were disallowed on November 29, 1904.

The plaintiff therefore prayed for a declaration that he was the owner in possession of the grove which had been wrongly recorded in its entirety in the defendants' *mahal*, and in the alternative, if he were found not to be in possession, for a decree for proprietary possession over one half of the grove. The defendants pleaded that in 1881, under an imperfect partition only *pattis* were formed; that in 1893, when a perfect partition took place different *mahals* were formed, and the entire grove in dispute fell into the defendants' share; that the plaintiff being a party to that partition did not take objections to the entry in respect of the grove and was therefore barred by the rule of *res judicata* and that the defendants being in exclusive possession of the grove since 1893, the suit was also barred by section 42, Specific Relief Act.

The Court of first instance found that there was no evidence that the plaintiff did not have any knowledge of the perfect partition in 1893 nor was there any evidence that the plaintiff had any possession of the grove since that time; that the Revenue Court having ordered the disposition of the grove in dispute by partition in 1893, under clause *p* to section 241 of Act XIX of 1873, and under clause *k* to section 233 of Act III of 1901, the Civil Court was not competent to entertain the suit which was also barred by the rule of *res judicata*. The Munsif dismissed the suit. On appeal the District Judge found that the plaintiff's *patti* including half of the grove was specially exempted from partition in 1893; that the entry in respect of the entire grove was due apparently to the Amin's mistake; that the suit having been brought within 12 years of 1893, the question of possession was immaterial; and that the question of allocation of half of the grove not being before the Revenue Court, it acted without jurisdiction in allocating the grove to the share of the defendants. He allowed the appeal.

Defendants preferred a second appeal.

*Sital Prasad Ghosh*, for the appellants.

*S. C. Chauahri* (for *S. C. Banerji*), for the respondent.

The following judgment was delivered by

BANERJI, J.—The facts of this case are these:—The village Alipur was by an imperfect partition made in 1881 divided into 32 pattis. On the 5th of August, 1892, Hira Lal a co-sharer in the village applied to the Revenue Court for perfect partition and prayed that certain pattis which belonged to him should be formed into a separate mahal. The defendants Tirbeni Sahai, Gomti Sahai and Musammat Suraj Kuar, who were named opposite parties to the application of Hira Lal, made an application on the 15th of December, 1892, in which they asked that their pattis also should be formed into a separate mahal. On the 18th of August, 1893, a partition proceeding was drawn up to the effect that 20 pattis should be formed into different mahals, and 12 pattis, one of which was patti No. 32, should form a separate mahal to be called the mahal of the *non-applicants for partition*. Accordingly a partition was effected which has been confirmed by the Collector. By this partition the village was divided into 26 mahals, the 26th mahal being that of the non-applicants for partition. The pattis of Tirbeni Sahai and others were included in Mahal Hira Lal. In patti No. 32 which is the patti of the plaintiff, and which was included in the 26th mahal, the mahal of the non-applicants for partition, there is a grove No. 623. This grove was allotted to the mahal in which the defendants are co-sharers. The plaintiff states that he has a half share in the grove, that the defendants have no right to that half share, and that the inclusion of the whole of the grove in the defendants' share was improper. The plaintiff accordingly brought the present suit for a declaration of his right to a half share of the grove No. 623 and in the alternative for possession of that share. The court of the first instance dismissed the suit as barred by the provisions of section 233, clause (k) of the Land Revenue Act No. III of 1901. The lower appellate court has set aside the decree of that court and has decreed the plaintiff's claim. That court was of opinion that as under the partition proceeding patti No. 32 was excluded from partition, the revenue authorities had no jurisdiction to include the grove

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Banerji, J.

in suit, which appertained to that patti, in the mahal of the defendants. The learned Judge relies upon the decision of this court in *Kishen Prasad v. Kadher Mal* <sup>(1)</sup>. That case is clearly distinguishable from the present. What happened in that case was that under a previous partition of the land of the village four mahals had been formed, one of which was called *Patti Shamilat*. Subsequently a partition of *Patti Shamilat* alone took place and certain land which appertained to one of the other three mahals was partitioned. It was held that this partition did not preclude the Civil Court from determining the plaintiff's right to a plot of land which was not the subject of the partition of the *mahal Shamilat*. In the present case the whole of the village was under partition. The Revenue authorities directed that the village should be divided into 26 mahals one of which the mahal of the non-applicants for partition, was to consist of 12 pattis. If land which appertained to one of these 12 pattis was allotted to another of the mahals under the partition, that was a matter relating to partition and ought to have formed the subject of an appeal under section 132 of Act No. XIX of 1873 which was the Act under which the partition in question was effected. Rightly or wrongly the revenue authorities allotted to the defendants' mahal what the plaintiff says ought to have been allotted to his mahal, namely, the mahal of the non-applicants for partition. This was clearly a question relating to the partition or union of mahals within the meaning of clause (k), section 233 of Act No. III of 1901, and was therefore not cognizable by a Civil Court. The plaintiff mistook his remedy and instead of appealing against the order confirming the partition he brought the present suit in a Civil Court. Such a suit falls within the prohibition of section 233 (k) and is not maintainable. The court of first instance was in my judgment right. I accordingly allow the appeal, set aside the decree of the court below and restore that of the court of first instance with costs in all courts.

*Appeal decreed.*

[A Letters Patent Appeal (No. 82 of 1907) against the above judgment was dismissed by STANLEY, C. J., and BURKITT, J., on March 6, 1908—Ed.]

(1) [1899] 20 A. W. N., 11.

*T. F. H.*

## RAGHUBIR SARAN AND OTHERS

*versus*

## HET RAM AND ANOTHER.\*

*Code of Civil Procedure (Act XIV of 1882) Section 13, Explanation II,  
—Suit by auction-purchaser—Second relief for sale upon mortgage.*

A property was mortgaged first to B, then to H. Both the mortgagees brought suits for sale without joining the other mortgagee and obtained decrees and sold and purchased the mortgaged property. H executed his decree first and obtained possession. B applied for mutation of names and was resisted by H. He brought a suit for possession as auction-purchaser. The suit was dismissed. He then brought the present suit, as mortgagee, for sale, making all the persons interested, including H, parties to the suit. *Held* that the suit was not barred by the rule of *res judicata* inasmuch as B in the suit for possession, as auction-purchaser, was not litigating under the same title as he was in the present suit. *Held* further that the relief for sale could not have been joined in the suit for possession by the auction-purchaser.

APPEAL against the decree of Pandit Kunwar Bahadur, officiating Subordinate Judge of Shahjahanpur.

Suit for sale on a mortgage.

The material facts appear from the judgment.

The Court below dismissed the suit.

Plaintiff appealed.

*Sarat Chandra Chaudhri* (for *J. N. Chaudri*) and *Sundar Lal*, for the appellants.

*Abdul Majid* (with him *Moti Lal Nehru*), for the respondents.

The judgment of the Court was delivered by

RICHARDS, J.—The question involved in this appeal is very clear. The suit is brought on foot of a mortgage, dated the 15th of January, 1885, executed by one Rao Bhup Singh, in favour of the father of the plaintiffs, namely, Badri Pershad. A second mortgage was executed on the 21st of July, 1885, in favour of the defendants, Het Ram and Budh Sen. Badri Pershad sued on foot of his mortgage but he only

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GRIFFIN, J.*Richards, J.*

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*Richards, J.*

made party to the suit his own mortgagor. It is quite clear therefore that the defendants were not bound by the decree. The defendants also sued on foot of their mortgage and got a decree but they omitted to make Badri Pershad a party to their suit. Both parties executed their decrees and both parties themselves purchased the property. The defendants having executed their decree before Badri Pershad managed to get into possession. Badri Pershad then sought to get mutation of names by virtue of his auction-purchase. The defendants objected. Thereupon sometime in the year 1896, Badri Pershad brought a suit claiming possession. It is important to remember what was the exact nature of this suit by Badri Pershad. His title was entirely based upon his character as auction-purchaser under the decree, which he had obtained against his own mortgagors. The defendants pleaded amongst other things that they were not bound by the decree inasmuch as Badri Pershad had neglected to make them parties to the suit, which he had instituted on foot of his mortgage, dated the 15th of January, 1885. It is quite clear that this plea was fatal to Badri Pershad's claim as auction-purchaser and so the court decided and dismissed his suit on the 4th of June, 1896. The plaintiffs then instituted the present suit, which is for the sale of the mortgaged property against the defendants, whose names were omitted from the array of parties in the first suit, brought by Badri Pershad on foot of his mortgage. The court below has decided that Badri Pershad, who is now represented by the plaintiffs in the suit, was bound when he instituted his suit in 1896 to claim not only possession as auction-purchaser but also in the alternative for a decree for sale according to the provisions of the Transfer of Property Act and that inasmuch as he did not join these two claims the present suit is barred by the provisions of section 13, explanation II, of the Code of Civil Procedure. This is the only question which has been argued before us in the present appeal. Section 13 of the Code of Civil Procedure provides "no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the

same title, in a court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Explanation II says: "any matter which might and ought to have been made ground of defence or *attack* in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It seems to us that when Badri Pershad brought his suit against the defendants claiming as auction-purchaser he was not litigating under the same title as he is litigating in the present suit. If Badri Pershad in the suit of 1896 had stated that the defendants had been omitted from the *array* of the defendants in his suit which he had instituted on foot of his mortgage, it would have been quite destructive of his claim as auction-purchaser. It would not have been a "ground of attack." The relief in one case was actual possession of the land. The relief in the other case is merely a decree *nisi* for the sale of the mortgaged property in which case the defendants will have a right to redeem the property, if they think fit so to do. We do not think that the claim in the present suit ought to have been joined with the claim for possession brought by Badri Pershad in the year 1896 and that the rule of *res judicata* does not apply. It has been conceded on behalf of the defendants that the mere fact that Badri Pershad omitted to make the defendants parties to the mortgage suit does not *debar* the plaintiffs from bringing the present suit and they rest their case upon the fact that the relief claimed in the present suit was not included in the suit which was instituted in the year 1896 by Badri Pershad.

We allow the appeal, set aside the decree of the court below and remand the case under the provisions of section 562 of the Code of Civil Procedure for disposal according to law. The appellants will have their costs in this court including fees on the higher scale. Other costs will abide the event.

*Appeal allowed.*

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RAGHUBIR SARAN  
v.  
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Richards, J.

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1908.

November, 14.  
STANLEY, C. J.  
BANERJI, J.

PIARE LAL

versus

LALA NAND RAM AND OTHERS.\*

*Code of Civil Procedure (Act XIV of 1882) section 13—Res judicata—Relief—Sale of property—money decree passed—Second suit for sale—barred.*

A suit for sale upon a mortgage was compromised. Under the terms of the compromise a simple money decree was passed in favour of the mortgagee. The decree was not satisfied and the decree-holder brought a suit for sale of the same property upon the same mortgage. *Held* that the suit was barred by the rule of *res judicata* inasmuch as the relief for sale not having been granted in the first suit must be considered to have been refused. *Shibu v. Chandra Mohun*, I. L. R., 33 Cal., 849; *Bholu Nath v. Muhammad Sadiq*, I. L. R., 26 All., 223 referred to.

SECOND APPEAL against the decree of J. H. Cuming Esq., Additional Judge of Aligarh, reversing a decree of Maulvi Muhammad Shafi, Subordinate Judge.

Suit for sale on a mortgage.

Material facts appear from the judgment.

The Court below dismissed the suit.

Plaintiff appealed.

*B. E. O'Connor*, for the appellant.

*Durga Charan Banerji* (with him *M. L. Agarwala*) for the respondents.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—This appeal arises out of a suit for sale of mortgaged property. It was dismissed under the following circumstances as barred by section 13 of the Code of Civil Procedure. It appears that in the year 1880, the predecessors in title of some of the defendants and the other defendants executed a mortgage in favour of the predecessors of the plaintiff. A suit was thus brought upon this mortgage on the 21st of September, 1882, in which a sale of the mortgaged property was claimed. The suit was

\* S. A. No. 488 of 1907.

compromised on the terms that a simple money decree only should be passed in favour of the plaintiff and such a decree was passed on the 27th of November, 1882. The events which happened subsequent to the date of this compromise it is unnecessary for the purposes of decision of this appeal to detail. Suffice it to say that the amount due to the plaintiff on foot of the compromise was not satisfied or at least fully satisfied. Thereupon the suit out of which this appeal has arisen was instituted for sale of the mortgaged property. The first court decreed the claim but upon appeal the lower appellate court dismissed it, on the ground that it was barred by section 13 (explanation 3) of the Code of Civil Procedure. In that explanation it is laid down that any relief claimed in a plaint which is not expressly granted by the decree shall for the purposes of this section be deemed to have been refused. In view of this section the claim of the plaintiff in the first suit for sale of the mortgaged property must be deemed to have been refused; and therefore his right as mortgagee to have a sale of the mortgaged property became barred as a matter of *res judicata*. In view of this section it is impossible to hold that a fresh suit for sale can be maintained and therefore we think that the lower appellate court rightly dismissed the plaintiff's suit. This view is supported by the decision of the Calcutta High Court in the case of *Shibu Bera v. Chandra Mohun Jana* <sup>(1)</sup>, the facts of which are admittedly on all fours with the facts of the present case. That decision is in no way in conflict with the decision of Benches of this Court in the case of *Bhola Nath v. Muhammad Sadiq* <sup>(2)</sup> and *Madho Prasad v. Baij Nath* <sup>(3)</sup>. In both of these cases it will be found that in the suit originally instituted by the plaintiffs no claim was put forward for sale of the mortgaged property; the plaintiffs contented themselves with applying for simple money decrees. Section 13, therefore, had no application. We therefore dismiss the appeal with costs including fees in this Court on the higher scale.

*Appeal dismissed.*

(1) [1906] I. L. R., 33 Cal., 849. (2) [1903] I. L. R., 26 All., 223.

(3) [1905] 25 A. W. N., 152.

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PIARE LAL

v.

NAND RAM.

Stanley, C. J.

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1908.

November, 28.

STANLEY, C. J.  
BANERJI, J.

SAGAR MAL

versus

MAKHAN LAL AND OTHERS.\*

*Agra Tenancy Act (II of 1901), Local, section 4 (5); section 32 (2) Chapter III—Partition of rent-free holding—Suit maintainable.*

Section 32 (2) does not apply to a rent-free grantee but falls within Chapter III which deals with division, devolution and transfer of tenancies. A tenant does not include a rent-free grantee. A suit for partition of a rent-free holding is maintainable in the Civil Court. *Abdul Karim v. Ramsan*, A. W. N., 1908, p. 197, approved.

APPEAL from the decree of Munshi Ahmed Ali, Additional Judge of Meerut, confirming the decree of B. Hari Mohan Banerji, first Additional Munsif of Meerut.

Suit for partition of a rent-free holding.

The defence was that such a suit was not maintainable. The court below decreed the suit.

Defendant appealed.

*Mohan Lal Sandal*, for the appellant, submitted that no suit lay for partition of the rent-free holding.

He referred to last para. of section 32 and clauses 8 and 9 of section 4 of the Agra Tenancy Act. Tenancy was nowhere defined in the Act but tenant and land-holder were correlative terms and were defined together. A rent-free grantee was not a tenant in the strict sense of the term. The section however should be interpreted as it stood. The law laid down in *Abdul Karim v. Ramsan*, [1908] A. W. N., 197, was open to doubt.

*M. L. Agarwala*, was not called upon to reply.

The judgment of the Court was delivered by

STANLEY, C. J.—This appeal arises in a suit for partition of a rent-free holding. Both the Courts below have granted the plaintiffs a decree. This appeal has been preferred by one of the defendants Sagar Mal and the only ground of appeal pressed before us is that in the case of a rent-free grant, as of

\* S. A. 1284 of 1907.

any other tenancy coming under the Agra Tenancy Act, a civil or a revenue court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition. We are of opinion that this section does not apply to a rent-free grantee. The section in question falls within chapter III which deals with the "devolution, transfer and division of tenancies." A tenant is defined in section 4, clause (5), and does not include a rent-free grantee. A rent-free grantee, as also a mortgagee of proprietary rights, is by that definition expressly excluded. Consequently a rent-free grant does not appear to us to be a "holding" within the meaning of section 32. The word "holding" in that section means, we think, holding of a tenant as defined by the Act. We may point out that the heading of section 32 is division of "tenancies," *i. e.* the division of the holdings of tenants as defined in section 4. We may also point out that chapter X of the Act deals with the resumption of rent-free grants. A separate chapter in the Act is devoted to these grants. This view was expressed by our brother Richards in the case of *Abdul Karim v. Ramzan* (1). Our learned brother, after referring at length to some of the sections of the Agra Tenancy Act held that a suit for partition of land alleged to be rent-free is not excluded from the jurisdiction of a Civil Court either by section 233 (k) of the Land Revenue Act or by section 32 of the Agra Tenancy Act. We therefore agree in the view expressed by both the Courts below and dismiss the appeal with costs which will in this Court include fees on the higher scale.

M. L. S.

*Appeal dismissed.*

(1) [1908] 28 A. W. N., 197.

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v.  
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*Stanley, C. J.*



CIVIL.

1908.

November, 3.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

## JAI LAL SINGH AND OTHERS

versus

## HARI SINGH AND ANOTHER.\*

*Probate and Administration Act (V of 1881), section 33—Minors—Right to be appointed administrators.*

Section 33 of the Probate and Administration Act does not warrant Letters of Administration being granted to minors under the guardianship of any one. Only in cases where minors are solely entitled to the estate according to the rules for distribution of the intestate's estate can Letters of Administration be granted to persons to whom the minors' estate has been committed by competent authority.

FIRST APPEAL FROM AN ORDER of the District Judge of Agra.

Application for Letters of Administration.

The material facts appear from the judgment.

The Court below granted the application.

The opposite party appealed.

*Sir Walter Colvin* (with him *Benode Behari*), for the appellants.

*Satish Chandra Banerji*, for the respondents.

The judgment of their Lordships was delivered by

Aikman, J.

AIKMAN, J.—This is an appeal under section 86 of Act No. V of 1881 from an order of the learned District Judge of Agra granting letters of administration. The application was presented by one Hira Lal and it asked that letters of administration to the estate of one Harbhajan, deceased, should be granted to him for the use and benefit of his minor sons, Hari Singh and Tulshi Ram. The application was opposed by Chunni Lal and Jai Lal, who are half-brothers of Hira Lal. They raised a plea on the basis of section 13 of the Act which prohibits letters being granted to any person who is a minor. The learned Judge overruled this objection relying on section 33 of the Act and he has granted letters of administration to the minors under the guardianship of their father, Hira Lal. In the formal order as drawn up in the Court

\* F. A. F. O. 37 of 1908.

below letters have by some mistake been granted in respect of the property, not of Harbhajan, but of Hira Lal's father, Gulab Singh. In our opinion the order of the learned District Judge cannot be supported. Section 33 does not warrant letters of administration being granted to minors under the guardianship of any one, but in certain cases it allows letters of administration to be granted to persons to whom the care of the minor's estate has been committed by a competent authority, or if there be no such person, to such other person as the Court thinks fit to appoint. In that case letters of administration are granted for the use and benefit of the minor until he attains majority. But to render that section applicable the minor must be "solely entitled to the estate of the intestate according to the rule for the distribution of the intestate's estates applicable in the case of the deceased." In this case it is quite clear that the minors were not solely entitled to the estate according to the rule for distribution. Whether or not the objectors are entitled to a share in it, and as to this we pronounce no opinion, there can be no doubt that the minor's father was entitled to a share and he could have applied for letters of administration for himself. Why he did not do so, and why he chose to apply for letters of administration on behalf of his minor sons, there is nothing to show, and no explanation has been given to us. In our opinion the order of the learned Judge as passed cannot be maintained. We so far allow the appeal as to set aside the order appealed against and we dismiss the application as brought. It will be open to Hira Lal, or to any one else who considers himself entitled to letters of administration, to present an application for the grant of such letters of administration. Under the circumstances of the case we make no order as to costs.

*Order set aside*

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*Aikman, J.*

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November, 30.

AIKMAN, J.  
KARAMAT  
HUSAIN, J.

AYUB ALI KHAN

*versus*

MASHUQ ALI KHAN.\*

*Agra Tenancy Act (II of 1901, Local) sections 22, 32—Occupancy rights acquired by widow before the passing of Act—Devolution on brother—Jurisdiction—Civil and Revenue Courts.*

Defendant's appeal.

Y and M, two Mahomedan brothers, jointly held an occupancy holding. M died before the passing of the new Tenancy Act leaving a widow. His share in the holding was recorded in the widow's name. The widow of M died leaving a brother. The Revenue Courts entered the name of Y's son in place of M's widow. The widow's brother brought this suit for joint possession. *Held* that the suit was not obnoxious to the bar of section 32 (2), Tenancy Act, as it was not a suit for actual division of the occupancy holding. *Held* further that M having died before the passing of the Tenancy Act his widow inherited his property absolutely and had absolute right to be considered an occupancy tenant and that after her death, which took place after the passing of the Act, her brother was entitled to succeed as provided in section 22 (c). *Ikram-ud-din v. Arshad Ali*. Sel. Dec. Board of Rev., No. 2 of 1905, approved.

FIRST APPEAL from the order of Babu Khetter Mohan Ghose, Additional Judge of Aligarh, reversing a decree of Maulvi Mubarak Husain, Munsif of Bulandshahar.

Suit for a declaration of right.

One Jawahir Khan, an occupancy tenant, had two sons, Yaqub Ali Khan and Muzaffar Khan. Muzaffar Khan having died before Act II of 1901 came into force, the name of his widow, Musammat Rasul-un-nisa was entered jointly with that of Yaqub Ali Khan as occupancy tenants of the holding. On Rasul-un-nisa's death in 1902, her brother, Mashuq Ali Khan, applied in the Court of Revenue that his name should be recorded in the revenue papers as successor to Rasul-un-nisa. This application was opposed by Ayub Ali Khan, son of Yaqub Ali Khan, since deceased, with the result that the Revenue Court ordered the entry of Ayub's name. Thereupon, Mashuq Ali sued in the Civil Court for a declaration that he was entitled to a

\* F. A. F. O. No. 44 of 1908.

moiety of the holding as heir to his sister, Rasul-un-nisa, and for joint possession with the defendant, Ayub Ali. He also claimed damages. The defendant contended that having regard to section 32 of the Tenancy Act, the suit was not maintainable; and this plea found favour with the court of first instance which dismissed the suit. On appeal, the lower appellate court reversed the decision of the first court, and remanded the case under section 562 of the Code of Civil Procedure.

The defendant appealed.

*Surendra Nath Sen*, for the appellant, submitted that the Court was not competent to declare or specify the extent of the share in the joint holding; that the definement of the share was equivalent to a partition of the property, and that the plaintiff's suit was obnoxious to the provisions of section 32 of the Tenancy Act. He relied on

*Achhey Lal v. Janki Prasad*, [1906] I. L. R., 29 All., 66.

He next submitted that the plaintiff was no heir to his sister, Rasul-un-nisa, under section 22 of the Tenancy Act; that Rasul-un-nisa did not acquire the occupancy rights by cultivating the holding for twelve years but that her name was recorded as the widow of Muzaffar Khan; that under the Tenancy Act the widow had but a qualified estate, which was defeasible on her re-marriage, and that on her death, the succession opened out to her husband's heirs and not to her heirs; that the list of heirs enumerated in section 22 of the Act was a complete and exhaustive list and could not be supplemented by the table of heirs under the Mahomedan law; that the aforesaid section ought to be construed in its plain and grammatical sense and that if words importing the masculine gender were so construed as to include the feminine gender, the result would be that on the death of a female tenant without leaving any male issue, the estate would descend to her husband to the extent of his life-interest and no more, although under no legal system the husband was known to inherit only a life estate in his wife's property, which he would lose on re-marrying.

*Muhammad Ishaq*, for the respondent, was not called on to reply.

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KHAN

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AYUB ALI KHAN

v.

MASHUQ ALI  
KHAN.*Aikman, J.*

The Judgment of the Court was delivered by

AIKMAN, J.—An occupancy holding was held jointly by two brothers Yaqub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan which took place before the present Tenancy Act came into operation, the name of his widow Musammat Rasūlunnisa was recorded in his stead as the joint occupancy tenant of the land. She died in 1902 after the new Tenancy Act came into force. Upon her death her step-brother, Mashuq Ali Khan, plaintiff-respondent, endeavoured to get his name entered in the revenue records in her stead. The revenue authorities however entered the whole holding in the name of Ayub Ali Khan, the son of Yaqub Ali Khan. Thereupon the plaintiff Mashuq Ali Khan brought a suit in the civil court for declaration of his right to a moiety of the holding for joint possession thereof and also for damages. The Court of first instance threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge held that it was cognizable by the Civil Court, and remanded the case for disposal on the merits. Against that order of remand the present appeal has been preferred. Two pleas have been urged before us. One is that the suit is obnoxious to the provisions of section 32 (2), Tenancy Act, which prohibits any suit for the division of a holding or distribution of the rent thereof being entertained by any Civil or Revenue Court. In our opinion this plea cannot prevail. If having got his declaration the plaintiff attempted to sue for actual division of the holding or distribution of the rent, he might be met by this section. We do not think that this section prohibits a suit like the present.

It was next urged that having regard to the provisions of section 22 of the Act, which provides for succession to tenancies, the plaintiff does not possess the right which he sets up. The decision of this plea is more difficult. After giving the point our best consideration, we are of opinion that under the circumstances of the case, plaintiff has the right of succession under section 22 of the Act. The plaintiff's sister succeeded under the former Act, No. XII of 1881. Under section 9 of that Act the occupancy right devolved to her "as if it were land." She being Mahomedan widow acquired, in our opinion, an abso-

lute right to be considered an occupancy tenant. Succession to her occupancy right is governed by section 22 of the new Act. It is true that that section is worded as if males alone can be ex-proprietary, occupancy or non-occupancy tenants. But we can find nothing in the other provisions of the Act which would prevent a woman acquiring such rights. There is nothing to prevent a woman being a tenant of agricultural land and if she held it continuously for 12 years she would acquire a right of occupancy just as a man would. We cannot therefore attach, to the fact that the words in section 22 are words importing only the masculine gender, the weight which is sought to be placed upon them. We think that Musammat Rasulunnisa having been occupancy tenant, her half-brother, who it is not denied was the son of the same father, is entitled to succeed under clause (c) of the section. The same question was very fully considered by three members of the Board of Revenue in *Ikaramuddin v. Arshad Ali* (1). There it was held that a Mahomedan widow who succeeded to an occupancy holding, acquired an absolute estate and that on her death after the 1st of January 1902, the persons to succeed will be her heirs and not the heirs of her deceased husband. We agree in this view. The result is that the appeal fails and is dismissed with costs.

J. P.

*Appeal dismissed.*

(1) Sel. Dec. Board of Revenue, No. 2 of 1905.

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AYUB ALI KHAN

7.

MASHUQ ALI  
KHAN.

*Atkman, J.*

CIVIL

1908.

November, 7.

STANLEY, C. J.  
BANERJI, J.

NISAR HUSAIN  
*versus*  
ALLAH BAKHSH.\*

*Decree—Execution of—Ambiguity—Reference to pleadings.*

A suit was brought for possession of a courtyard, demolition of *chabutra* and removal of certain *pernalas*. The court of first instance decreed it in respect of the first two and dismissed the relief about *pernalas*. The defendant appealed and the plaintiff filed objections. The appellate court "dismissed the appeal and allowed the objections" but did not specify the nature of the relief which was accorded to the plaintiff.

*Held* that there was not such an ambiguity in the decree as would prevent the court in execution from giving effect to it. *Kalp Kuar v. Bisheshar*, A. W. N., 1890, p. 75; *Jawahir Mal v. Kistur Chana*, I.L.R., 13 All., 343; *Lachmi Narain v. Jwala Nath*, I. L. R. 18 All., 344; *Hursarun Singh v. Purshun Singh*, [1870] 2 N.W.P., p. 415; referred to.

LETTERS PATENT APPEAL from the judgment of KNOK, J., reversing a decree of D. R. Lyle, Esq., District Judge of Moradabad, reversing an order of Khwaja Abdul Ali, Munsif.

Application to execute a decree.

The material facts appear from the judgment.

A single Judge of the High Court had dismissed the application.

The decree-holder appealed.

*S. Shamsuddin*, for the appellant.

*A. H. C. Hamilton*, for the respondent.

The judgment of the Court was delivered by

*Stanley, C. J.*

STANLEY, C. J.—This appeal arises in execution proceedings in a suit brought by the plaintiff against the defendant in which he claimed four separate reliefs. Relief No. 1 was for recovery of possession of a courtyard; No. 2 to have a *chabutra* and a drain newly constructed by the defendant demolished and removed; No. 3, possession of certain plots of land numbered 2 and 3, and No. 4, for the removal of two

\*L. P. A. 26 of 1908.

eastern *pernalas*. The Court of first instance decreed the plaintiff's claim in respect of reliefs 1 and 2, but dismissed it as regards reliefs Nos. 3 and 4. An appeal was preferred by the defendant against the decree and objections also were filed by the plaintiff under section 561 of the Code of Civil Procedure according to which he claimed to have his claim established in respect of relief 4. He submitted to the decree dismissing his claim as regards relief No. 3. The appeal was heard and a decree passed thereon on the 3rd of December, 1900, in the following terms :—"That the decree of the court below of the 30th of September, 1899, be modified and the appeal be dismissed with costs. The objection of the respondent be allowed with costs." Now as regards this decree it is manifest that the appeal having been dismissed the plaintiff was entitled to hold the decree obtained by him in the court of first instance in respect of reliefs 1 and 2. Then as regards the objection in respect of the *pernalas* that objection having been allowed, it appears to us to be clear that the plaintiff was entitled to relief No. 4. An application for execution of the decree was made. The learned Munsif came to the conclusion that the decree was ambiguous and was not in compliance with the requirements of section 579 of the Code of Civil Procedure and refused to execute it. On appeal the learned District Judge reversed the decision of the Munsif, holding that the decree was capable of execution and should be executed and he accordingly so directed. A second appeal was preferred to this Court with the result that the learned Judge who tried the appeal came to the conclusion that the decree was so defective and ambiguous that it was incapable of execution, and therefore he overruling the lower appellate court and agreeing with the learned Munsif declared that the decree was incapable of execution. Our learned brother in the course of his judgment says as follows:—"The decree which the Munsif was called on to execute was not merely ambiguous, it was absolutely defective. What the lower appellate court has done is to decide that which the lower appellate court ought to have decided and to have embodied in its decree." What the meaning of the latter portion of this sentence is we fail to understand. Then the learned Judge says:—"It is lamentable to find decrees drawn up in this slovenly and

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NISAR HUSAIN

v

ALLAH BAKHSI

Stanley, C. J.



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NISAR HUSAIN  
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defective way. The decree-holder has been at the expense of litigating his claim in the present instance up to the High Court, and then finds that he has a decree which is useless to him simply because a decree-writer is too lazy to think out or to obtain from the court what is the real decree issued by that court." We quite agree with our learned brother in his observations in regard to the slovenliness and want of care which has been shown in the preparation of the decree in this case. But it is one thing to find that the decree is drawn up in a slovenly fashion and another to hold that by reason of such defect in the decree a plaintiff is to lose the fruits of his litigation. As we have said, the plaintiff established his rights to reliefs 1, 2 and 4. This is clear from the decree of the court of first instance coupled with the decree of the lower appellate court. In so far as the lower appellate court affirms the decision of the court of first instance there is no ambiguity whatever in the decree, as it incorporates the decree of the court of first instance. We may point out that when this Court affirms the decision of a lower court it does not ordinarily go further than declare that the decree of the lower court is affirmed. It does not repeat the language of the decree of the court below. Then as regards the matter in respect of which the objection was filed, it is true that the decree ought to have specified the nature of the relief which was accorded to the plaintiff. But that appears from a reference to the pleadings and the decree of the court of first instance. We think therefore that there was no such ambiguity in the decree as prevented the court in execution from giving effect to it. We are supported in this conclusion by similar decisions of this Court, as for example *Kalp Kuar v. Bisheshar*<sup>(1)</sup>, *Jawahir Mal v. Kistur Chand*<sup>(2)</sup>, and *Lachmi Narain v. Jwala Nath*<sup>(3)</sup>. In the last mentioned case it was held that where a decree is in its terms ambiguous it is competent to the court executing it to refer to the pleadings in the suit in which the decree was passed to ascertain its precise meaning. On the part of the respondent the decision in the case of *Hursarun Singh v. Purshun Singh*<sup>(4)</sup> was relied upon. In that case we merely find that the Court intimated that the decree which did not specify the

(1) [1890] 10 A. W. N., 75.

(2) [1891] 1 L. R., 13 All., 343.

(3) [1896] 1 L. R., 18 All., 344.

(4) [1870] 2 N.-W. P. H. C. Rep., 415

relief granted, but merely repeated the judgment that the appeal be decreed, was not a sufficient compliance with the requirements of the law. We quite agree in the view so expressed. Such a decree is not in accordance with the requirements of the law, but it does not follow from this that no effect is to be given to a decree which does not strictly comply with the directions contained in the Code of Civil Procedure. We therefore allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both appeals to this Court.

*Appeal decreed.*

CIVIL.  
1908.  
NISAR HUSAIN  
v.  
ALLAH BAKHSH.  
Stanley, C. J.

JAGARNATH SINGH AND OTHERS

*versus*

SHIV GHULAM SINGH.\*

*Code of Civil Procedure (Act XIV of 1882), section 244—Reversioners brought on record as Hindu widow's representatives—Competency to object in execution—Suit.*

CIVIL.  
1908.  
November 27.  
STANLEY, C. J.  
BANERJI, J.

A decree was passed against a Hindu widow. On her death the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the debt was contracted without legal necessity. Their objections were overruled and they filed the present suit. *Held* that the suit was not barred by the provisions of section 244, Civil Procedure Code, inasmuch as they could not contend in execution proceedings that the mortgagor was not competent to make the mortgage. *Liladhar v. Chaturbhuj* I. L. R., 21 All., 277, followed.

SECOND APPEAL against the decree of E. F. Oppenheim, District Judge of Gorakhpur, reversing a decree of Munshi Achal Bihari, Subordinate Judge.

Suit for a declaration.

The material facts appear from the judgment.

\* S. A. No. 1102 of 1907.

CIVIL.

1908.

JAGARNATH

SINGH

v.

SHIV GHULAM

SINGH.

*Stanley, C. J.**Iswar Saran* (with him *Jugul Kishore*), for the appellants.*Sundar Lal* (with him *Tej Bahadur Sapru*), for the respondent.

The judgment of the Court was delivered by

STANLEY, C. J.—This appeal arises out of a suit for a declaration that a share of certain zamindari property was not liable to be sold in execution of a decree obtained against a Hindu widow on foot of a mortgage executed by her. Musammat Raghubansa executed a mortgage in favor of the defendant Shiv Ghulam Singh and on foot of that mortgage Shiv Ghulam obtained a decree for sale on the 1st of April 1905. After this date Musammat Raghubansa died and thereupon the appellants, who claimed to be the reversioners of the deceased owner, the husband of Musammat Raghubansa, were brought upon the record as the representatives of Musammat Raghubansa, on an application under section 89 of the Transfer of Property Act for an order absolute. They filed an objection to the sale on the ground that the mortgage was executed by Musammat Raghubansa without legal necessity. Their objection was disallowed and thereupon the suit out of which this appeal has arisen was filed for a declaration that the property was not liable to be sold in execution of the mortgage decree. The court of first instance decreed their claim but upon appeal the lower appellate court reversed the decision of the court below and dismissed the plaintiff's suit on the ground that it was barred by the provisions of section 244 of the Code of Civil Procedure. The learned Advocate for the respondent admits that this section does not apply and that the learned District Judge was wrong in the view taken by him. The case is on all fours with that of *Liladhar v. Chaturbhuj* <sup>(1)</sup>. In that case it was held by one of us and by AIKMAN, J., that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. In view of this decision the learned District Judge was clearly wrong.

(1) [1889] I. L. R., 21 All., 277.

We therefore allow the appeal, set aside the decree of the lower appellate court and as the appeal was decided upon a preliminary point, we remand the case under section 562 of the Code to that court with directions that it be reinstated in the file of pending appeals and be disposed of on the merits. The appellants will have the costs of this appeal including fees on the higher scale. All other costs will abide the event.

*Appeal allowed.*

CIVIL.

1908.

JAGARNATH  
SINGH.

v.

SHIV GHULAM  
SINGH.

Stanley, C. J.

DOONGAR SINGH

*versus*

KING EMPEROR.\*

CRIMINAL.

1908.

November, 12.

RICHARDS, J.  
KARAMAT  
HUSAIN, J.

*Stamp Act (II of 1899), section 62, Sch. I, art. 53 (c)—decree for rent—merging of rent in decree—payment of decree—Receipt, whether Stamp necessary.*

Article 53 (c) of the Stamp Act does not exempt, from payment of Stamp, a receipt of payment of a decree for rent although it makes an exception in favour of a receipt for payment of rent of an agricultural holding. When the debt of rent merges into a decree, a receipt for money paid must be stamped.

Absence of fraudulent intention in not stamping a receipt of payment of a decree is not sufficient to make a conviction bad.

Reference by B. J. Dalal Esqr., Sessions Judge of Agra, against an order of S. Muhammad Hashim, Magistrate, first class.

A decree was passed against a tenant for arrears of rent. The tenant paid up the decree and obtained a receipt from Doongar Singh, the agent of the zamindar. The receipt was not stamped. Doongar Singh was prosecuted under the Stamp Act and sentenced to a fine of Rs. 40 or in default to imprisonment for 40 days. He applied to the Sessions Judge in revision. The Sessions Judge passed the following order:—

The applicant was fined under section 62 of the Stamp Act and has applied in revision to have the Deputy Magistrate's order set aside. He granted an unstamped receipt on recovering money due on a decree in a rent suit. The question is whether such a receipt falls within exception (c) of article 53 of Schedule I of the Stamp Act or not. I am of opinion that it does. The decree did not change the character of the demand and

\*Cr. Ref. No. 654 of 1908.

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the payment of a rent decree by a tenant was tantamount to the payment of rent by a cultivator. This view finds support from Donogh's Commentary of the Stamp Act. I find a note under article 53: "It is immaterial whether the receipt be given in satisfaction of a decree for rent or otherwise." I have been unable to discover the authority quoted: "B. O. No. 108, dated 26th February, 1902." I submit the record to the High Court with a recommendation that the conviction of the applicant may be set aside, and that the fine, if any recovered, may be refunded.

Assistant Government Advocate (*W. K. Porter*) appeared for the Crown.

The accused was not represented.

The Judgment of the Court was delivered by

*Richards, J.*

RICHARDS, J.—Doongar Singh was convicted under section 62, Indian Stamp Act (II of 1899) and sentenced to a fine of Rs. 40 or to suffer simple imprisonment for 40 days. It appears that the accused held a decree for rent against a certain tenant and gave a receipt for the amount of the decree to the tenant without any stamp denoting payment of duty. The accused Doongar Singh was himself merely an agent of a zamindar. Generally speaking, receipts must be stamped, but an exception is made by article 53 (c), schedule I, of the Stamp Act in favour of receipts for payment of rent by cultivators on account of land assessed to Government revenue. The learned Sessions Judge has referred the matter to this Court under section 438, Criminal Procedure Code, suggesting that the conviction is wrong and should be set aside, inasmuch as a receipt for a decree for rent must be treated as a receipt for rent. A learned Judge of the Court considering the matter of general importance has referred the case to a Bench of two Judges. In our judgment the conviction was correct. The debt of rent merged in the decree, and it is admitted that a receipt for money payable under a decree must bear a stamp. We do not think that there was any intention to defraud the revenue. Absence of such intention though not sufficient to make a conviction bad, may be taken into consideration in awarding punishment. We alter the sentence from a fine of Rs. 40 to a fine of Rs. 5, or in default imprisonment for 40 days. If the fine has already been paid, Rs. 35 will be refunded. Let the record be returned.

X

*Record returned.*

## MAZHAR HASAN

*versus*

## SAEED HASAN.\*

CIVIL.

1908.

November 20.

RICHARDS, J.  
GRIFFIN, J.

*Criminal Procedure Code (Act V of 1898), section 195, 439—Sanction—Miscellaneous proceedings—Civil Procedure Code (Act XIV of 1882), section 622—Revision—Charge—Legal Practitioner's Act (XVIII of 1879), section 14.*

A pleader purporting to act on behalf of a lady filed a compromise. The lady complained to the Subordinate Judge that she had not authorised the pleader to compromise but the application was "shelved." The lady then complained to the District Judge who directed an enquiry by the Subordinate Judge. The Subordinate Judge then held an enquiry and examined certain witnesses on behalf of the lady. He disbelieved the applicant, who was a witness, and on the application of the pleader, sanctioned his prosecution. This order was confirmed by the District Judge. *Held* that the High Court could not revise this order under section 439, Criminal Procedure Code. *Salig Ram v. Ramjilal*, 1. L. R., 28 All, 554, (F. B.) referred to. *Held* further that no revision lay on the Civil side, as the courts below had not acted without jurisdiction. *Held* further that the shelving of the first complaint was not a refusal to entertain the charge, and this complaint followed by the communication from the District Judge amounted to a "charging of the pleader in the court of the Subordinate Judge" within the meaning of section 14, Legal Practitioners' Act.

CIVIL revision against an order of Babu Nihal Chandra, Subordinate Judge of Moradabad.

The material facts appear from the judgment.

*G. P. Boys*, for the applicant.

*B. E. O'Connor*, for the opposite party.

The judgment of the Court was delivered by

RICHARDS, J.—This application is connected with Criminal Revision Nos. 220 and 221 of 1908.

*Richards, J*

The facts are shortly as follows:—

Certain civil proceedings were proceeding in the Court of the Subordinate Judge. The suit was one by a Muhammadan lady for dower. In the course of the execution of a decree in that suit a compromise was filed on behalf of the lady by

\* Civil R., 29 of 1908, with Cr. R., 220 and 221 of 1908.

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*Richards, J.*

her vakil. The lady sent a complaint to the High Court, District Judge and the Subordinate Judge, alleging that the compromise had been filed contrary to her interest by her vakil in collusion with the other side. The Subordinate Judge apparently did not consider it necessary to take any steps as the result of the lady's communication. Her letter was unverified and apparently not produced by a person duly authorized to produce it. The High Court sent the communication it received to the District Judge. The District Judge had the communication verified and sent it on to the Subordinate Judge for inquiry. It is quite possible that the District Judge did not intend that the Subordinate Judge should go the length of holding an inquiry under the Legal Practitioner's Act as the result of his direction. The Subordinate Judge, however, did hold an inquiry under the Legal Practitioner's Act. In the course of this inquiry the applicant was examined as a witness and he is alleged to have stated, amongst other things, that he never instructed the pleader to file the compromise. The Subordinate Judge on the application of the pleader granted leave to prosecute Mazhar Hasan the present applicant. There was an appeal to the District Judge, who refused to interfere with the order of the Subordinate Judge. The present applications are made to this Court. Criminal Revision No. 220 is brought under section 195 of the Code of Criminal Procedure. In our judgment an application under section 195 does not lie to this Court under the circumstances of the present case. The Subordinate Judge sanctioned the prosecution and the District Judge merely confirmed the order of the Subordinate Judge. The case is in our opinion governed by the case of *Salig Ram v. Ramji Lal*, (1). As to Criminal Revision No. 221 it is brought under the provisions of section 439 of the Code of Criminal Procedure. It is quite clear under the authority of the last mentioned case that this Court cannot entertain the application under the provisions of section 439. This application is made under the provisions of section 622 of the Code of Civil Procedure, and accordingly it is necessary for the applicant to show that the orders of the Subordinate Judge and of the District Judge were made without jurisdiction. The learned counsel for the applicant con-

(1) [1906] I. L. R., 28 All., 554 (F. B.)

tends that before an inquiry could be held under the Legal Practitioner's Act, it was necessary that a pleader should "be charged in his Court" with some offence mentioned in section 14 of the Act, and he contends that the only charge in the Subordinate Judge's Court was the letter of the lady to him and that the Subordinate Judge himself "shelved," that is to say, refused to hold any inquiry on that charge. We cannot agree with this contention. The Subordinate Judge had before him first the lady's complaint, subsequently he got from the District Judge a repetition of that complaint duly verified, and he then proceeded to hold the inquiry. We do not think that the shelving of the first letter was a refusal to entertain the charge, and we think that the first letter followed by the communication from the District Judge amounted to a "charging of the pleader in the Court of the Subordinate Judge" within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

*Order confirmed.*

CIVIL.

1908.

MAZHAR HASAN

v.

SAEED HASAN.

*Richards, J.*



CIVIL.

1908.

June, 10.

BANERJI, J.

## MALKHAN SINGH AND ANOTHER

versus

## KASHI PRASAD AND OTHERS.\*

*Pre-emption—Plaintiff dead—Representatives can carry on suit based on custom—Rule of Mahomedan Law—Pre-emptor's right—subsisting on date of decree—Second purchase by vendee—No suit for pre-emption—Vendee's title absolute—Burden of proof.*

The representative of the pre-emptor in a suit based upon the *wajib-ul-ars* is a co-sharer and can carry on the suit which his predecessor in title instituted. The principle of Mahomedan Law does not apply to a case of pre-emption based on custom.

A plaintiff claiming pre-emption is not entitled to a decree unless his right subsists upon the date of the decree. Where the vendees purchase a second share in the property and no suit for pre-emption is brought in respect of that share within one year, they are entitled to retain the share formerly purchased and in respect of which a suit for pre-emption had been instituted.

It is for the plaintiff pre-emptor to show that a suit for pre-emption in respect of the second purchase had been instituted.

SECOND APPEAL against the decree of H. E. Holme Esq., District Judge of Jhansi, confirming a decree of Babu Keshab Das, Munsif of Jalaun.

Suit for pre-emption.

The material facts appear from the judgment.

G. W. Dillon (for whom A. H. C. Hamilton), for the appellant.

Surendra Nath Sen, for the respondent.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—This appeal arises in a suit for pre-emption brought by one Ghasite. He died during the pendency of the suit and Kashi Prasad, his son was brought on the record as his legal representative. The claim was based on custom as recorded in the *wajib-ul-ars* and not on Mohomedan Law. The court of first instance decreed the claim. On appeal that decree was affirmed by the lower appellate court. The defendants vendees have preferred this appeal

\*S. A. No. 798 of 1907.

and they raise two contentions, (1) that the right of pre-emption is a personal right, that upon the death of Ghasite that right came to an end and that the suit ought upon his death to have been dismissed, and (2) that the vendees became co-sharers in the property before the institution of the suit and for this reason also the suit ought to have been dismissed, as the plaintiff had no priority over the vendees.

As regards this contention it is urged by Mr. Hamilton the learned counsel for the appellants, that the analogy of the Mahomedan Law should be applied and that as under that law the right of pre-emption is a right personal to the pre-emptor, his legal representative cannot assert that right. The same argument was put forward by Mr. Hamilton in *Kounshilla Kuar v. Gopal Prasad* <sup>(1)</sup> but he was overruled. I see no reason why in a claim for pre-emption based upon custom and not upon Mahomedan Law the rule of Mahomedan Law should be applied. The principle on which the rule of Mahomedan Law is founded, as explained in the Hedaya, does not apply to a case of pre-emption based on custom. The representative of the pre-emptor is a co-sharer and he can carry on the suit which his predecessor-in-title instituted. This disposes of the first plea.

As regards the second plea, the facts are these. The sale in respect of which pre-emption is claimed took place on 7th of September, 1905. The present suit was brought on the 30th of July, 1906. On the 26th of January, 1906 the vendees purchased another share in the Mahal in which the property claimed is situate, and thus became a co-sharer of the same degree as the plaintiff. The suit was decided by the court of first instance on the 28th of January, 1907. The vendees had thus become co-sharers in the village before the date of the institution of the suit and by reason of the lapse of one year from the date of the purchase they acquired an indefeasible title before the suit was decided. It is contended that as before the passing of the decree the vendees had become co-sharers in the Mahal by virtue of a purchase, which had taken place before the institution of the suit, the plaintiff's claim should not have been decreed inasmuch as he had no superior right to that of the vendees. This contention is in my judgment

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*Banerji, J.*

(1) [1906] 3 A. L. J. R., 191.

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well founded. A plaintiff claiming pre-emption is not entitled to a decree unless his right subsists upon the date of the decree. The vendees in this case had become co-sharers in the Mahal before the institution of the suit by reason of their having purchased another share in the mahal on the 26th of January, 1906. The right they acquired under their purchase, no doubt, was a defeasible right, and if a claim for pre-emption had been brought within one year and that claim had been decreed, they would have lost the right. There is nothing to show, however, that a claim for pre-emption was instituted. The learned Judge of the lower appellate court says, "there is nothing before me to show that no suit for pre-emption has been instituted." This is putting the *onus* on the wrong party. The defendants vendees could not prove a negative. It was for the plaintiff respondent to show that a suit had been instituted and the title of the vendees under their purchase of the 26th of January, 1906, was *sub judice*. The fact that on the date of the decree more than a year had elapsed from the date of their purchase was, in the absence of any evidence to show that a suit had been instituted *prima facie* proof that the vendees had become absolute owners of the property, which they had purchased. No such evidence was adduced and it is not even alleged on behalf of the plaintiff that any claim for pre-emption was brought. He is a co-sharer in the mahal and if any such claim had been put forward, he would undoubtedly have known of it and informed the court. The fact of his not asserting that a claim was made raises the inference that no such claim was advanced. The learned vakil for the respondent contended that the matter was not brought to the notice of the court of first instance. It appears, however, that the vendees did produce their sale-deed of the 26th of January, 1906, in the court of first instance and the court admitted it in evidence against the plaintiff. It is thus clear that the attention of the court was directed to it, but the court took no notice of it in its judgment. For this action of the court the appellants were in no way responsible. The first plea taken by them in their memorandum of appeal to the lower appellate court was founded on the fact of their having purchased a share in the mahal before the institution of the suit. As under these circumstances the appellants

had become co-sharers in the mahal before the institution of the suit and their right as such co-sharers by virtue of their second purchase had become indefeasible before the decree in the suit was made, the plaintiff, who had no priority, was not entitled to a decree for pre-emption. The result is that I allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's suit with costs in all courts.

*Appeal allowed.*

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**Act No. I of 1903 (U. P.).**

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**Adjudication**—*first complaint dismissed summarily—whether second barred.*

A Magistrate is not precluded from taking up a complaint on the facts on which a similar complaint had been summarily dismissed on a former occasion, and if it is shown that the complainant has some grounds for his complaint, the Magistrate should admit it. *Queen Empress v. Adam Khan*, I. L. R., 22 All., 108, distinguished.

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**Agra Tenancy Act (No. II of 1901) [U. P.]—(contd.)**

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**section 22—Male lineal descendant—Illegitimate son of a Sudra.**

An illegitimate son of a Sudra by a continuous concubine is entitled, in the absence of a legitimate son, to the occupancy holding of his father as a male lineal descendant. *Inderun v. Ramaswamy*, 13 M. I. A., 14; *Sarsuti v. Mannu*, 1 L. R., 2 All., 134; *Hargobind v. Dharam Singh*, 1 L. R., 6 All., 329, referred to.

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**section 22—male lineal descendants—Muhammadan Law of succession not applicable.**

The new Tenancy Act has completely altered the rule of devolution in the case of an occupancy tenancy upon the death of the tenant. The tenancy no longer devolves "as if it were land" (as in Act xii of 1881) but on the lineal male descendants of the last tenant. The Muhammadan law of succession does not apply.

Hence, where a Muhammadan occupancy tenant died leaving a son and grandson, *held* that they would share the occupancy holding equally.

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**sections 22, 32 Occupancy rights acquired by widow before the passing of Act—devolution on brother—Jurisdiction—Civil and Revenue Courts.**

*Y* and *M*, two Muhammadan brothers, jointly held an occupancy holding. *M* died before the passing of the new Tenancy Act leaving a widow. His share in the holding was recorded in the widow's name. The widow of *M* died leaving a brother. The revenue courts entered the name of *Y*'s son in place of *M*'s widow. The widow's brother brought this suit for joint possession. *Held* that the suit was not obnoxious to the bar of section 32 (2), Tenancy Act, as it was not a suit for actual division of the occupancy holding. *Held* further that *M* having died before the passing of the Tenancy Act his widow inherited his property absolutely and had absolute right to be considered an occupancy tenant and that after her death, which took place after the passing of the Act, her brother was entitled to succeed as provided in section 22 (c). *Ikrām-ud-dīn v. Arshad Ali*. Sel. Dec., Board of Rev., No. 2 of 1905, approved.

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**section 95, clause(b)—Declaration that plaintiff as the adopted son of a tenant was entitled to his tenancy—Declaration of tenancy—Jurisdiction—civil court.**

One *D* applied to revenue authorities that his adoptive father, *I*, was joint in cultivation with him and that his name should be recorded in respect of *I*'s occupancy holding. The Collector dismissed the application on the ground that *D*



**Agra Tenancy Act (No. II of 1901) [U. P.]—(concl'd.)**

was not the adopted son of *I*. *D* brought this suit in civil court for a declaration that he "was joint in cultivation with *D* and that he was the adopted son of *I* and that on account of the right of survivorship and his being joint in cultivation he was entitled to the possession of the estate of *I* and of the occupancy holding." *Held*, that the nature of the suit was that the plaintiff wanted a declaration as to the class of tenancy to which he belonged and its cognizance by the civil court was barred by clause (b) of section 95 of the Agra Tenancy Act.

DORI LAL *v.* SARDAR SINGH ... 514

**sections 164, 165.**

See Code of Civil Procedure, section 13 ... 117

**section 177—second**

*appeal to District Judge—proprietary title, question of.*

When a person, against whom a suit for arrears of rent is brought only pleads that the relation of landlord and tenant does not subsist between him and the plaintiff, and the Assistant Collector and the Collector decide against him, no second appeal lies to the District Judge inasmuch as no question of proprietary title is involved in the case. *Dul Chand v. Shamla*, A. W. N., 1905, p. 46, and *Chittar Singh v. Rup Singh*, A. W. N., 1906, p. 247, distinguished.

AHMADULLA KHAN *v.* MURLI ... 128

**section 177—which party**

*a tenant—Question of proprietary title.*

The question, which of the two parties is a tenant of a specified land, is not a question of proprietary title. *Chittar Singh v. Rup Singh*, [1906], A. W. N., 247, over-ruled.

NIRANJAN *v.* GAJADHAR ... 71

**section 201—shall pre-**

*sume—meaning of—presumption conclusive.*

The object of section 201 of the Agra Tenancy Act is that when the name of the plaintiff is recorded in the revenue papers, the court is bound to presume that he has the right to sue, and the entry of his name should be regarded as sufficient proof, and the court should not go behind it in order to determine the question of the plaintiff's proprietary title, the remedy of the defendant being a civil suit. The words "shall presume" in section 201 of the Agra Tenancy Act do not have the same meaning which are given to them under the Evidence Act but the presumption raised by them is a conclusive presumption so far as the Revenue Courts are concerned.

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**Agreement—between co-owners not to partition—not enforceable.**

See Hindu Law—Partition ... 670

**Alienation—Hindu widow.**

See Hindu Law ... 1

**Widow—Onus probandi—Legal necessity.**

See Hindu Law—Alienation ... 184

**Appeal—Agra Tenancy Act (II of 1901), section 177—second appeal to District Judge—proprietary title.**

See Agra Tenancy Act, 1901, section 177 ... 128

**Appeal—**(*concl'd.*)

—*Arbitration—decree passed upon—a private award—Code of Civil Procedure (Act XIV of 1882), sections 522, 526.*

When a matter is referred to arbitration, without the intervention of a court and a decree is passed upon the award made by the arbitrators, no appeal lies against such a decree, except in so far as it is in excess of or not in accordance with the award. *Mustafa Khan v. Phulja Bibi*, 1. L. R., 27 All., 526, not followed.

BAHADUR SINGH *v.* NEOGI PURAN SINGH ... 160

—*Code of Civil Procedure, 1882—Section 310A.*

See Code of Civil Procedure, 1882, section 244 ... 557

—*Code of Civil Procedure, 1882, section 549—order rejecting rehearing of appeal dismissed under.*

See Code of Civil Procedure, 1882, section 549 ... 109

—*His Majesty in Council—Order of remand under section 562, Code of Civil Procedure (Act XIV of 1882), section 596—"Final Decree."*

The High Court declined to grant leave to appeal to His Majesty in Council against an order of remand under section 562 of the Code of Civil Procedure in a case where a Subordinate Judge over-ruling a plea of limitation had dismissed a suit as barred by the rule of *res judicata* and the High Court reversed that decree upon the ground that the suit was neither barred by limitation nor the rule of *res judicata*. *Raja Tassaduk Rasul v. Farzand Husain*, 2 C. W. N., CCC1, followed.

KAUSELLA *v.* RAM SARUP ... 57

—*Execution of a decree—application for payment of sale proceeds to official assignee.*

See Code of Civil Procedure, 1882, section 244 ... 553

—*Order rejecting an application for substitution.*

See Code of Civil Procedure, 1882, section 588, 18 ... 363

—*order of remand after it is carried out—maintainability of—*

When an order of remand has been carried into effect before the filing of an appeal against that order, the appeal is not maintainable.

*Madhusudan v. Kamini*, 1. L. R., 32 Cal., 1023. *Salig Ram v. Brij Bilas*, 1. L. R., 29 All., 659, followed.

GULZARI MAL *v.* KABIR-UN-NISSA ... 270

See Code of Civil Procedure, 1882, section 562 ... 447

—*Court of Small Cause, decree passed by a—decree sent for execution to Munsiff—attachment and sale of immovable property—*

See Code of Civil Procedure, 1882, section 223 ... 612

**Arbitration—Guardian and Wards Act (VIII of 1890)—Power of the rival claimants for guardianship to refer the matter to arbitration.**

See Guardian and Wards Act, 1890 ... 101

—*Decree passed upon private award—Appeal.*

See Appeal ... 160

**Arbitration—***(concl'd.)*

————— *Award illegal if no time fixed in order of reference for delivery of award.*

See Code of Civil Procedure, 1882, section 508 ... 144

————— *Remission of award—second reference.*

See Code of Civil Procedure, 1882, section 508 ... 658

**Attachment of the profits of the future harvest.**

See Code of Civil Procedure, 1882, section 266 ... 251

**Auction purchaser—legal representative—Code of Civil Procedure, 1882, section 244.**

See Code of Civil Procedure, 1882, section 244 ... 557

**Ball—discretion.**

See Code of Criminal Procedure, 1898, section 498 ... 419

**Benami transaction, to effect a fraud—object defeated—Right to recover possession—instrument not operative—Setting aside of the instrument whether necessary—Limitation Act (XV of 1877), Art. 91, 144.**

In order to save his property from an equitable mortgagee, one C executed a *benamee* deed of sale in 1895, in favour of the defendant. The equitable mortgagee brought a suit and got a decree against C and his *benamee* transferee who paid him up. The representative of E brought this suit for possession of the property purported to have been sold. *Held* that he was entitled to recover possession inasmuch as he was not carrying out the illegal transaction, but was seeking to put every one in the same position as they were in before that transaction was determined upon. Moreover the purpose of the fraud having been defeated there was nothing to prevent the plaintiff from recovering possession of his property. *Taylor v. Bowers*, 1, Q. B. D., 291; *Symes v. Hughes*, L. R., 9 Eq., 475; *In re Great Berlin Steam Boat Company*, 26 Ch., s. 616; *Kearley v. Thomson*, 24 Q. B. D., 742, referred to.

In conspiracy the concert or agreement of the two minds is the offence, the overact is but the outward and visible evidence of it. Very often the overact is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself be comparatively insignificant and harmless, but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must according to the authorities be effected. Then, and then alone, the fraudulent grantor or giver loses the right to claim the aid of the law to recover the property he has parted with.

*Held* further that the sale-deed of 1895 was not an operative instrument, and it was not necessary for him to have it set aside as a preliminary to his obtaining a decree for possession, and the suit was governed by article 144, and not 91 of the Limitation Act.

T. P. PETHER PERMAL CHETTY *v.* R. MUNIANDY SERVAL ... P. C. ... 290

**Bhole Sultan Chhattis—custom—inheritance—exclusion of daughters.**

See Hindu Law ... 1

**Bond**—*construction—instalment bond—whole amount payable upon failure to pay any instalment—Suit to recover balance—instalments paid irregularly—waiver—interest from date of decree.*

A bond payable by instalments provided that on failure to pay any instalment, the obligee would be entitled to get the whole amount of the bond together with interest at 12 per cent. *per mensem* from the date of the bond. Some of the instalments were paid though irregularly and accepted. There was default again. In a suit to recover the balance due upon the bond with interest: *held*, that the plaintiff was entitled to recover the amount sued for with interest from the date of the decree.

*Sakhawat Hussain v. Gajadhar Prasad*, I. L. R., 28 All., 622, distinguished.

KAMDHANI SAHU *v.* LALIT SINGH ... 609

**Bundelkhand Encumbered Estates Act I of 1903**, [U.P.]—**section 12**—*joint decree—some judgment-debtors taking the benefit of the Act, discharged—liability of the remaining judgment-debtors.*

Judgment-debt is a private debt within the meaning of section 12 of the Bundelkhand Encumbered Estates Act. Where the holder of a decree against six judgment-debtors, five of whom took the benefit of the Act, failed to put forward his claim before the Special Judge, during the time allowed by law, the judgment-debt must be deemed to have been discharged to the extent of the joint liability of the persons taking the benefit of the Act. The judgment-debtor, who did not take the benefit of the Act, is only liable for his share.

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### **Burden of Proof.**

See *Onus Probandi*.

See Code of Civil Procedure, 1882, sections 283, 358 ... 601

### **Canal Act (VIII of 1873), section 70.**

See Penal Code, 1860, section 430 ... 159

### **Cause of Action—redemption—surplus profits.**

See Code of Civil Procedure, 1882, section 43 ... 192

——— *Jurisdiction.*

See Code of Civil Procedure, 1882, section 20 ... 89

### **Certificate of Sale—application for—limitation**

See Limitation Act, 1879, Sched. II, Art. 178 ... 516

### **Cess—Gharghanna.**

See Land Revenue Act, 1901, section 56 ... 361

**Champerly**—*Sale-deed in respect of property subject to litigation—non-payment of part of consideration—public policy—mesne profits recoverable by reversioner.*

The second and third plaintiffs, who succeeded to a certain estate as reversioners, executed in favour of the first plaintiff a sale-deed conveying certain villages. Under the sale-deeds only Rs. 600 were to be paid down and the balance, Rs. 46,000, was to be paid when the property was recovered. *Held* that this did not make the transaction contrary to public policy. The question of whether the

**Champertry**—(*concl'd.*)

transaction was unfair as between the assignor and assignee could not be raised where the assignors joined the assignees as plaintiffs in the suit.

*Held* further that the law of champertry as applicable in England did not apply in India.

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU ... .. P. C. ... 184

**Charge**—*unpaid vendor's lien.*

See Limitation Act, 1877, Sched. II, Art. 132 ... .. 243

**Code of Civil Procedure, (Act XIV of 1882), section II—religious rites and ceremonies—killing of cows—declaration of right—jurisdiction of civil court—nuisance.**

It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so, he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. Where the District Magistrate had ordered the Muhammadans of a village not to kill kine anywhere in the village, and the Muhammadans sued for declaration of their right and injunction, *held* that the right claimed was one to which they were legally entitled irrespective of custom, and were entitled to a declaration of such right. Slaughter of cattle could only be prohibited where it amounted to public nuisance and obnoxious to the rules and regulations lawfully promulgated for observance, and not when it was calculated to irritate the religious susceptibilities of a class or community.

SHAHBAZ KHAN *v.* UMRAOPURI ... .. 147

**section 13**

—*res judicata—decision on a preliminary point set aside on appeal—remand for trial on other issues—suit dismissed for default of parties.*

In a former suit for rent between the same parties the Collector on appeal held that a certain lease was inoperative and remanded the case for trial. It was then dismissed for default. *Held* in a subsequent suit for rent that the finding, although it was not embodied in the decree, operated as *res judicata* inasmuch as it was the basis of the Collector's order.

SHEIKH ALAM *v.* PARMANAND ... .. 48

**section 13**

—*res judicata—relief—sale of property for money decree passed—second suit for sale barred.*

A suit for sale upon a mortgage was compromised. Under the terms of the compromise a simple money decree was passed in favour of the mortgagee. The decree was not satisfied and the decree-holder brought a suit for sale of the same property upon the same mortgage. *Held* that the suit barred by the rule of *res judicata* inasmuch as the relief for sale not having been granted in the first suit must be considered to have been refused. *Shibu v. Chandra Mohun*, I. L. R., 33 Cal., 849; *Bhola Nath v. Muhammad Sadiq*, I. L. R., 26 All., 223, referred to.

PIARE LAL *v.* LALA NAND RAM ... .. 732

**Code of Civil Procedure, (Act XIV of 1882) —(contd).**


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**section 13**—*res judicata*—*question of title decided in former suit by revenue court*—*former suit instituted wrongly in revenue court*—*appeal to the civil court*—*suit to be deemed as instituted in right court.*

In a suit for an annuity for certain years, the defendants denied the title of the plaintiffs. In a previous suit in the revenue court between the same parties for arrears of revenue of certain other years it was decided, upon the admission of the defendant, that he was liable.

*Held*, that the decision of the revenue court operated as *res judicata* upon the question of title and the defendant was stopped from re-opening the question in the present suit and the plaintiffs were entitled to receive the amount of the annuity.

DWARKA DAS *v.* AKHAY SINGH ... .. 407

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**section 13**—*Explanation II*—*Agra Tenancy Act (II of 1901)*, sections 164, 165—*suit for profits*—*mode of collection.*

A suit for profits by one co-sharer against another was dismissed in 1905 by the Assistant Collector as barred by the rule of *res judicata*. This decision was reversed by the District Judge who remanded the case under section 562, Code of Civil Procedure. The decision of the District Judge was affirmed on appeal by the High Court. In second appeal, after remand, the plea of *res judicata* was again put forward, based upon certain decisions of the High Court, barring a second appeal in case of remand, under section 562, Code of Civil Procedure, under the Tenancy Act, and also based upon two other decisions between the same parties which had not been set up on the previous occasion. *Held* that the decision of the District Judge became final and its effect was not nullified by the decisions subsequently passed as to the right of appeal. As to the other decisions, they not having been relied upon before the District Judge as a ground of defence, could not be now set up under explanation 2 of section 13, Code of Civil Procedure. The appellant not only might but ought to have relied upon those decisions in the previous litigation.

In a suit under section 164 of the Tenancy Act, only the actual collections, made by the defendant, are to be taken into account in determining the amount of profits due. In a suit like the present, a plaintiff is not entitled to have profits calculated on what might have been collected or on the rates paid by tenants in other *khetwals* for lands of the same kind. This constitutes the distinction between a suit of this nature and one under section 165, Tenancy Act.

ABDUL RASHID *v.* ABDUL LATIF ... .. 117

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**section 13**—*Explanation II*—*suit by auction-purchaser*—*second relief for sale upon mortgage.*

A property was mortgaged first to *B*, then to *H*. Both the mortgagees brought suits for sale without joining the other mortgagee and obtained decrees and sold and purchased the mortgaged property. *H* executed his decree first and obtained possession. *B* applied for mutation of names and was resisted by *H*. He brought a suit for possession as auction-purchaser. The suit was dismissed. He then brought

**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

the present suit, as mortgagee, for sale, making all the persons interested, including *H*, parties to the suit. *Held* that the suit was not barred by the rule of *res judicata* inasmuch as *B* in the suit for possession, as auction-purchaser, was not litigating under the same title as he was in the present suit. *Held* further that the relief for sale could not have been joined in the suit for possession by the auction-purchaser.

RAGHUBIR SARAN *v.* HET RAM ... .. 729

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**section 20**—*Suit for profits of partnership—partnership entered at Lahore—business carried on at Hansi—plaintiffs residents of Khurja—alleged contract to remit profits to ‘the plaintiff’s place of residence not proved.*

Section 20, Code of Civil Procedure, enables the Court to stay a suit upon application made for that purpose. It does not empower the Court to entertain a suit which otherwise it would have no jurisdiction to entertain.

A partnership was entered into at Lahore, and the firm was carrying on the business at Hansi in the Punjab. Plaintiffs were partners of the firm, residing at Khurja in the United Provinces. They brought a suit for their shares of the profits in the court at Aligarh on the basis of an alleged special contract by virtue of which their share of the profits has been agreed to be remitted to Khurja. The alleged contract was not proved. *Held*, that the court below ought not to have entertained the suit and should have returned the plaint for presentation to the proper court.

BANKA MAL *v.* SHIAM LAL ... .. 89

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**section 25.**

See Code of Civil Procedure, 1882, section 223 ... 612

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**section 34**—*Non-joinder, objection as to—Objection to be taken at the earliest opportunity—Limitation.*

Where a defendant does not take any objection as to non-joinder of necessary parties in his written statement but does so upwards of six months afterwards, and the plaintiff thereupon makes an application for the names to be added which is done after the period of limitation for the suit had expired: *held*, that the suit is not barred by limitation as the defendant’s objection as to non-joinder not having been made at the earliest opportunity ought to have been disregarded with reference to section 34, Code of Civil Procedure.

HAZARI MAL *v.* BHAWANI RAM ... .. 554

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**section 43**—*Suit for redemption decreed—Second suit for surplus profits recovered by mortgagee during mortgage not maintainable—Effect of Article 105, Limitation Act (XV of 1877).*

Article 105 of the Limitation Act must not be construed so as to conflict with the provisions of section 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by a suit for redemption. Where a mortgagor brings a suit and obtains a decree for redemption, he cannot maintain a second suit for recovery of surplus collections made by the mortgagee, during the period of the mortgage, section 43 of the Code of Civil Procedure being a bar to the maintenance of that suit.

**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

*Per KARAMAT HUSAIN, J.*—The right to claim the surplus profits is synchronous with the right to claim possession of the mortgage property, and to hold that the cause of action for claiming excess collections accrues when the mortgage debt has been satisfied, is inconsistent with the principles on which the law of redemption is based.

RAM DIN *v.* BHUP SINGH ... 192

**sections 43, 373—**

*First suit for declaration of right and partition—Second suit for partition of joint property—Cause of action identical—First suit withdrawn—Second barred—Limitation Act (XV of 1877), Art. 106—Suit for partition, a suit for a share in dissolved partnership.*

The plaintiff brought a suit for declaration that certain property in Moradabad District purchased by the defendant in his name was purchased with the money belonging to the parties and taken out of the partnership business of which the parties were joint owners and for portion of that property. This suit was withdrawn without permission to bring a fresh suit as the parties referred the matter in dispute to arbitration. The arbitration fell through and the plaintiff brought this suit for partition of certain property situate at Naini Tal which had been purchased in the joint names of the parties. In the plaint, he alleged that the property at Naini Tal was purchased with the profits of the partnership business. *Held*, that the cause of actions in both the suits were identical and the second suit was barred by section 43 of the Code of Civil Procedure as the plaintiff ought to have included his present claim in the first suit. *Held*, further, that the suit was barred by section 373 of the Code. *Held* further, that the suit was also barred by article 106 of the Limitation Act inasmuch as it was a suit for a share in the profits of a partnership which had been dissolved more than three years before the suit.

NIAS AHMAD *v.* ABDUL HAMID ... 278

**section 108.**

See Provincial Small Causes Court Act, 1887, section 25... 295

**sections 206, 551—**

*Effect of dismissal of appeal under that section—Whether decree or order—Amendment.*

The dismissal of an appeal under section 551, Code of Civil Procedure, is a decree which supersedes the decree of the court below. Hence the only court which has jurisdiction under section 206 of that Code to amend the decree is the court which has acted under section 551.

ASMA BIBI *v.* AHMAD HUSAIN ... 585

**sections 223, 617—**

*Decree passed by a Court of Small Causes—Attachment and sale of immoveable property—Decree sent for execution to Munsif—appeal.*

A decree passed by a Court of Small Causes sought to attach and sell immoveable property and was, therefore, sent for execution to the Munsif's court under section 223, Code of Civil Procedure. Application having been made for execution in the Munsif's court, the judgment-debtor raised certain objections which were over-ruled.

*Held*, that the appeal lay to the District Judge, neither the suit nor the execution proceedings having been transferred to



**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

the Munsif's court, but the decree was sent under section 223 of the Code. Had the suit or the execution proceedings been transferred to the Munsif's court under section 25 of the Code or the execution proceedings instituted in the Munsif's court under section 35, Provincial Small Cause Courts Act, the proceedings held in the Munsif's court might be regarded as proceedings held by a Court of Small Causes.

ATWARI *v.* MAIKU ... .. 612

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**section 244—Application for payment of sale proceeds to official assignee—Not an application in execution—Appeal.**

An official assignee is not a representative of the judgment-debtor within the meaning of section 244, Civil Procedure Code. An application for payment of money to him of the proceeds of sale is not an application for execution, discharge or satisfaction of the decree, and no appeal lies against an order rejecting that application. *Kashi Prasad v. Miller*, I. L. R., 7 All., 752, followed.

C. E. GREY *v.* HAZARI LAL ... .. 553

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**section 244—Decree against Hindu widow—death of the widow—reversioners, whether representatives of judgment-debtor.**

A decree for sale upon a mortgage of the husband's property was passed against a Hindu widow. She died before execution, and the decree-holders applied to bring the reversioners of the husband on the record. The reversioners objected on the ground that they were not the representatives of the widow. *Held*, that it is the duty of the court to stay execution until the question so raised is decided by a separate suit or to determine itself the question. If it decides that they are not the representatives of the judgment-debtor, it should reject the application.

KHUMAN SINGH *v.* MAKHAN SINGH ... .. 550

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**section 244—Reversioners brought on record as Hindu widow's representatives—Competency to object in execution—Suit.**

A decree was passed against a Hindu widow. On her death the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the debt was contracted without legal necessity. Their objections were over-ruled and they filed the present suit. *Held* that the suit was not barred by the provisions of section 244, Civil Procedure Code, inasmuch as they could not contend in execution proceedings that the mortgagor was not competent to make the mortgage. *Liladhar Chaturbhuj*, I. L. R., 21 All., 277, followed.

JAGARNATH SINGH *v.* SHIVGULAM SINGH ... .. 745

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**sections 244, 310A—Dispute between judgment-debtor and auction purchaser—Appeal—Auction purchaser, a representative of judgment-debtor.**

An auction purchaser is a representative of the judgment-debtor and not that of the decree-holder whose interest in the case closes as soon as he gets his money. Any dispute between a judgment-debtor and the auction purchaser is not a dispute between parties to the suit or their representatives and does not fall within the purview of section 244 of the Civil Procedure Code.

**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

No appeal lies against an order passed under section 310A of the Code of Civil Procedure, but the order is capable of being revised.

A dispute between the judgment-debtor and his representative does not fall within section 244.

*Manickhu v. Rajagopala*, I. L. R., 30 Mad., 507; *Imtiaz Begam v. Dhuman Begam*, I. L. R., 29 All., 275, dissented from. *Basir-ud-din v. Jhori Singh*, I. L. R., 19 All., 140, followed. *Kuber Singh v. Sahib Lal*, I. L. R., 27 All., 263; *Gulzari Lal v. Madho Ram*, I. L. R., 26 All., 447; *Migan Lal v. Dhosi*, I. L. R., 25 Bom., 631; *Rignor v. The Mussoorie Bank*, I. L. R., 7 All., 681, referred to.

ANANDI KUNWARI v. AJUDHIANATH ... 557

**section 244—Dispute between decree-holder and purchaser of a share in joint property belonging to judgment-debtor and decree-holder.**

*W* obtained a decree for possession of her share in joint property against *A*. Before execution *R* attached and sold that property as *A*'s and *N* purchased it. *W* was afterwards put in formal possession of her share. *W*'s application for mutation of names was refused. She brought the present suit. *Held*, that in view of the fact that the property was undivided revenue paying property *W* was only entitled to be put in formal possession. As soon as she was put in formal possession she obtained all that she was entitled to under the decree and when the defendant resisted her, she was entitled to bring a suit. *Gulzari Lal v. Madho Ram*, I. L. R., 26 All., 447, distinguished. *Held* further that it was not necessary to bring *N* upon the record on account of his purchase as he was a purchaser *pendente lite*.

WALAYATI BEGAM v. NANDKESHORE ... 547

**sections 244 and 318—right to sue for possession—auction purchaser.**

An auction purchaser of the property in execution of his decree or his legal representative can not maintain a suit for possession, section 244 of the Code of Civil Procedure being a bar to the suit. *Madhusudan Das v. Gobind Prial*, I. L. R., 27 Cal., 34; *Kattayat Pathumayi v. Raman Menon*, I. L. R., 26 Mad., 740; *Kalian Singh v. Thakur Das*, 3 A. L. J. R., 234: S. C., 26 A. W. N., 87, followed.

*Sheo Narain v. Nur Muhammad*, 4 A. L. J. R., 434: S. C., I. L. R., 29 All., 463, reversed.

SHEO NARAIN v. NUR MOHAMMAD ... 20

**section 244—Execution of decree—Sale of immovable property—Purchased by decree-holder—Suit to obtain possession by assignee of auction-purchaser—Practice—Full Bench reference—Bench not constituted—Powers and duties of a Division Bench.**

Where in execution of a simple money decree certain property was sold and purchased by the decree-holder himself, and where after the confirmation of the sale the decree-holder failed to obtain possession of the property purchased, and it remained in the hands of the judgment-debtor, *Held* that a suit by an assignee of the decree-holder for possession of the purchased land was barred by section 244, Code of Civil Procedure. *Kalyan Singh v. Thakur Das*, 3 A. L. J. R., 234, followed.

**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

*Semble.* A Division Bench of the High Court made a reference to the Full Bench, but the Chief Justice refused to constitute a bench to hear the reference. *Held* that the Division Bench could rehear the case.

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**sections 244, 258—**

*Payment twice over—Suit for recovery of that amount—maintainable.*

Sections 244 and 258 of the Code of Civil Procedure do not preclude the institution of a suit by a judgment-debtor for recovery of money, which he had paid to the decree-holder privately and the payment of which, not being certified, could not be recognised, and for which the decree-holder had taken out execution over again. *Shadi v. Ganga Sahai*, I. L. R., 3 All., 538; *Periatumbi Undayan v. Vellayal*, I. L. R., 21 Mad., 409, followed.

GENDO *v.* NEHAL KUNWAR ... 470

**sections 244, 258—**

*Ex parte decree—Money realised by decree-holder—Decree set aside—Decretal amount reduced—Refund.*

*B* obtained an *ex parte* decree against *J* for Rs. 19,041 and realised the amount. The decree was set aside and the decretal amount was reduced by about Rs. 1,800. The judgment-debtor applied for refund of that amount. *Held*, that the remedy of the judgment-debtor to realise that amount was both by a suit and an application and he could avail himself of any of the two remedies. *Collector of Meerut v. Kulka Prasad*, I. L. R., 28 All., 665; *Shiam Sunder v. Kaisarjamani*, I. L. R., 29 All., 143, applied. *Shaman Pershad v. Hurro Pershad*, 10 M. L. A., 203, referred to.

When an *ex parte* decree is set aside, the parties are relegated to the position they were in before the decree was passed. Where before the passing of the decree there was an injunction against the defendant from realising certain money from court, the injunction was revived when the decree was set aside.

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**sections 248.**

See Limitation Act, 1879, Sched. II, ARTICLE 179 cl. (5) ... 524

**section 259—Payment**

*out of Court—Recognition by court without certifying.*

If money due under a mortgage-decree under section 88 of the Transfer of Property Act is paid out of court and neither party takes steps to have it certified under section 258 of the Code of Civil Procedure, the court executing the decree is precluded from recognising the alleged payment out of court. *Vaidhivadasamy v. Somasundaram*, I. L. R., 28 Mad., 473, followed. *Hatim Ali v. Abdul Gaffur*, 8 C. W. N., 102, dissented from. *Oudh Behari Lal v. Nageshar Lal*, I. L. R., 13 All., 278; *Malikarjunada v. Lingamurti*, I. L. R., 25 Mad., 244, referred to.

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**section 258.**

See Section 244 ... 470

**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

**section 266—Mortgagees not advancing the whole amount—Balance whether a debt—Attachment—Suit by purchaser—Cause of auction.**

The unpaid portion of a loan does not constitute a debt due by a mortgagee to mortgagor and could not be attached as such in execution of a simple money decree against the mortgagor. The purchaser of such a debt has no cause of action to bring a suit against the mortgagees. *The South African Territories Limited v. Wallington*, [1898] A. C. 309, referred to.

PHULCHAND *v.* CHANDMAL ... .. 491

**section 266—Right to get profits in future years—Attachment.**

The decree-holders applied for attachment of profits then due to their judgment-debtor from the lambardar as well as profits which would accrue at a future date. Held that in the profits of future harvest, the judgment-debtor had only a possible right to get a share, and this possible right was not liable to attachment having regard to the provisions of section 266 of the Code of Civil Procedure. *Hari Das v. Baroda*, 1. L. R., 27 Cal., 38; *Uday Kumar v. Hari Ram*, 1. L. R., 28 Cal., 483; *Syad Tufazzul Husain v. Raghonath Pershad*, 14 M. L. A., 40; *Jones v. Thompson*, 27 L. J. Q. B., 234; *Webb v. Stenten*, 11 Q. B., 578, referred to.

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**section 266—Arrears of rent—Suit by auction-purchaser.**

Arrears of rent due under a sub-lease which under the contract were made payable to the lessor's zamindar, constitute a debt due to the lessor which is liable to attachment and sale under section 266 of the Code of Civil Procedure.

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**section 283—Intervenor—Burden of proof—**

An intervenor, in a suit brought by him, is bound to satisfy the court that the document upon which the claim is founded represents a *bona fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. *Tulshi Rai v. Ram Das*, [1887] A. W. N., 71; *Afzal Begam v. Muhammad Obaidat Ullah*, [1899] A. W. N., 220; *Ram Nath v. Bindrabai*, 1. L. R., 18 All., 369; *Govind Atmaram v. Santui*, 1. L. R., 12 Bom., 270, referred to.

*Suba Bibi v. Balgobind*, 1. L. R., 8 All., 178, distinguished.

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**section 283—suit under—burden of proof.**

When an objection preferred under section 278 of the Code of Civil Procedure is disallowed and the objector institutes a suit, he is bound to lay some evidence to satisfy the court that the document under which he claims represents a *bona fide* and genuine transaction and the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. *Tulshi Rai v. Ram Das*, A. W. N., 1887, p. 71; *Afzal Begam v. Muhammad Obaidat-ullah*, A. W. N., 1899, p. 220.

**Code of Civil Procedure, Act XIV of 1882.— contd.)**

*Ramnath v. Bindraban*, I. L. R., 18 All., 369; *Gobind Atmaram v. Santai*, I. L. R., 12 Bom., 270; *Suba Bibi v. Balgobind*, I. L. R., 8 All., 178, referred to.

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**section 283—Valuation of the suit.**

See Court Fees Act (VII of 1870), sched. II, art. 17, cl. 1. 10

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**sections 293, 306—25 per cent not paid immediately on sale, effect of.**

When a purchaser of property at a court sale fails to deposit the 25 per cent of the purchase money, immediately after the sale, it is not only irregular but it is no sale at all and the decree-holder is not justified in claiming the difference of price between the first and second sales. *Intizam Ali v. Narain Singh*, I. L. R., 5 All., 316, followed.

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**section 306.**

See section 293 ... 336

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**sections 310A, 311, 320,—Government rule 17 (XII)—Person whose immovable property has been sold—One co-sharer—right to apply—deposit by one co-sharer, pending an application to set aside the sale.**

One of several co-sharers of property which has been sold, is a "person whose immovable property has been sold within the meaning of section 310A, Civil Procedure, and has a right to apply to set aside the sale and that it is not necessary to join all the co-sharers in the application.

When a deposit is made by one of the co-sharers, it is the duty of the collector to pass an order setting aside the sale and the fact that an application by the other co-sharer to set aside the sale on the ground of material irregularity, under section 311 was pending is no bar to the making of the deposit and getting the sale set aside on that ground.

*Nel Lall v. Sheikh Kareem Bux*, I. L. R., 23 Cal., 686; *Paresh Nath v. Nabo Gopal*, I. L. R., 29 Cal., 1, referred to.

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**section 311.**

See Section 310A ... 253

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**section 310A.**

*Appeal—revision.*

See Section 244 ... 557

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**section 316.**

See Limitation Act, 1879, sch. II, art. 178 ... 516

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**section 318.**

See Section 244 ... 20

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**section 320.**

See Section 310A ... 253

**Code of Civil Procedure, (Act XIV of 1882).—(contd.)**

—**section 362.—appeal**  
*—death of appellant—all heirs not brought upon the record*  
*—duty of the heirs—abatement.*

A Muhammadan appellant having died his sons applied to be brought upon the record in their place. The respondents applied that his daughters may also be added as parties. This application was not granted. *Held* that it was the duty of sons to bring their sisters upon the record along with themselves and they not having done so the appeal abated. *Ghamandi Lal v. Amir Begam*, 1. L. R., 611 followed.

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—**section 377.**  
 See section 43 ... 228

—**section 440—Minor—**  
*Suit by next friend—Notice to certificated guardian—*  
*No formal order granting leave to next friend to sue—*  
*Presumption.*

A as next friend of B, a minor, instituted a suit to have a sale-deed executed by C, the certificated guardian of B, set aside. Notice was issued to C under section 440, Civil Procedure Code, but he showed no cause. No formal order granting leave to A to institute the suit was recorded, but the court proceeded to frame issues, and examine witnesses. *Held*, that it must be presumed that the court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf, and the court below was wrong in dismissing the suit on the ground that leave to institute the suit had not been formally granted and recorded.

SRIDHAR RAO v. RAM LAL ... 633

—**section 503—Power to**  
*appoint receiver—Execution of decree.*

Section 503 of the Code of Civil Procedure gives the court power to appoint a receiver where the decrees passed against third parties in favour of the judgment-debtor are attached in execution and where it appears that by so doing the interest of the parties will be saved.

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—**section 508—Provi-**  
*sions mandatory and imperative—No time fixed in the*  
*order of reference—No award.*

The provisions of section 508 of the Code of Civil Procedure are mandatory and imperative.

Where the court appointed an arbitrator but did not fix the time within which the award was to be filed, and the arbitrator filed the award that very day: *Held*, that the proceedings were obnoxious to the mandatory provision of section 508 and the award was no award in law. *Raja Har Narain v. Chaudharain Bhagwant Kuar*, L. R., 18 I. A., 55, followed.

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—**sections 508, 520**  
*—second reference—Power of court—Remission of*  
*award.*

A reference was made to arbitration. The arbitrator examined the witnesses and made an award after the death of

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one of the parties and without bringing upon the record the name of his legal representatives. The Munsif "set aside the award and sent back the case to the arbitrators for decision," the legal representative of the deceased party agreeing to the submission. *Held*, that the Munsif had no power to refer the case to a second arbitration as after setting aside the first award, the power of the Munsif to refer was exhausted. *Held* further that the Munsif could not remit the award under section 520 as no objection to its legality was apparent on the face of it. *Nanak Chand v. Ram Narain*, I. L. R., 2 All., 181; *Perumalla Salyanaryana v. Perumalla Venkata*, I. L. R., 27 Mad., 112, referred to.

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**section 520.**

See Section 508

**sections 521, 591—**

*One plaintiff not joining the reference—Whether a ground to set award aside—Challenged in final decree—Appeal.*

Section 521 of the Code of Civil Procedure does not contemplate the setting aside of an award on the ground that all the parties to the suit were not parties to the reference to arbitration. Where therefore one of the defendants added under section 32, Code of Civil Procedure, and who subsequently withdrew from the suit, did not join the reference which was followed by an award, *held*, that the award could not be set aside.

A munsif set aside an award on the ground that all the parties to the suit were not parties to the reference and tried and decreed the suit. The defendant challenged the Munsif's order setting aside award in an appeal against the final decree and raised other grounds as well. *Held*, that the ground could be entertained. *Sheonath v. Ram Din*, I. L. R., 18 All., 19; *Sher Singh v. Diwan Singh*, I. L. R., 22 All., 366; *George v. Vastun*, I. L. R., 22 Mad., 202; *Achutayya v. Thimmayyar*, 16 Mad. L. J., 228, referred to.

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**section 522.**

See Appeal ... .. 160

**section 526.**

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**section 549—Appeal**

*—Order rejecting application for rehearing of appeal dismissed under section 549.*

No appeal lies against an order refusing to re-admit an appeal rejected on the ground of the failure of the appellant to furnish security for the costs of the respondent under section 549 of the Code of Civil Procedure. *Lekha v. Bhauna*, I. L. R., 18 All., 315, referred to.

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**sections 551, 585.**

See Section 206 ... .. 585

See Section 574 ... .. 300

**sections 562, 566.**

Where no new issues have to be framed, but only such of the issues as the first court left entirely undecided are to

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be determined, the court of appeal is justified in sending the case back under section 562 of the Code of Civil Procedure. *Mata Din v. Jamna Das*, I. L. R., 27 All., 691, referred to.

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**section 562.**

See Section 588 ... 447

**sections 551, 574—**

*Provisions of section 574 not applicable to appeals dismissed under 551.*

The provisions of section 574 of the Code of Civil Procedure do not apply in their entirety to the case of an appeal dismissed under section 551 of the Code. *Rami v. Brojo*, I. L. R., 25 Cal., 97, not followed.

SAMIN HASAN V. PIRAN ... 300

**section 583.**

See section 244 ... 527

**section 584—Second**

*appeal—Custom—question of law—insufficient or illegal evidence.*

Certain tenants transferred the sites of their houses in the village. The zamindars sued the transferees for possession. The defendants produced several sale-deeds showing that sites of houses in the village had been formerly transferred. There was no evidence to show under what circumstances those sales were made. The *wajib-ul-arz* was silent upon the point. The courts below found that a custom had sprung up in the village whereby the tenants could transfer the sites of houses in the village.

*Held*, that where a question arises as to the existence or non-existence of a particular custom where the lower appellate court has acted upon illegal evidence, or on evidence which was legally insufficient to establish an alleged custom, the question is one of law. *Raj Narain v. Budh Sen*, I. L. R., 27 All., 338; *Hasim Ali v. Abdul Rahman*, I. L. R., 28 All., 698, referred to.

*Per* AIKMAN, J.—When a tenant occupies the house in consequence of and as appertaining to his agricultural tenancy, the *onus* is on him to prove that he has a right to transfer the house-site.

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**section 588, cl. 18—**

*Order rejecting an application for substitution—Appeal.*

*Held*, that an order rejecting an application made by persons claiming to be the legal representatives of a deceased appellant is an order within the meaning of section 588, clause 18, of the Code of Civil Procedure, and it is not necessary that the dispute referred to in section 367 of Civil Procedure Code must be one between rival claimants as legal representatives.

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**sections 562, 588,**

**591—Practice—Order of remand—Appeal from, after decree in suit.**

An appeal lies from an order of remand passed under section 562, Civil Procedure Code, even though before the



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filing of the appeal, the suit has been decided in compliance with the order of remand. *Rameshur Singh v. Sheodin Singh*, I. L. R., 12 All., 510, F. B.; *Jatinga Valley Tea Company v. Chera Tea Company*, I. L. R., 12 Cal., 45; *Babu Lal v. Ram Kali*, 3 A. L. J. R., 40, followed. *Salig Ram v. Brij Bilas*, I. L. R., 29 All., 659, over-ruled.

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—order of remand carried  
out—appeal from the order of remand.

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—section 588, cl. 28—  
order of remand in a partition suit—Court Fee payable on  
memorandum of appeal.

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—section 591.

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—section 596.

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—section 617.

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—order under section 310A  
of the Code of Civil Procedure, 1882.

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—section 622.

See Code of Criminal Procedure, 1898 ... 749

—section 622.

See Provincial Small Cause Court Act, 1887, section 25 ... 295

—section 623—Review  
—Inaccurate expression in judgment—Mistake corrected.

The judgment of the High Court contained the following sentence: "This under the Muhammadan Law would be what is known as an *ariat*, and therefore invalid." An application for review was presented contending that an *ariat* was valid and the expressions in italics were wrong.

*Held*, that an *ariat* was valid under the Muhammadan Law, and it was not meant to decide otherwise in the judgment. The expressions "and therefore invalid" were incorrect and were ordered to be expunged.

*Per BANERJI, J.*—Strictly speaking this application for review of judgment is not maintainable under section 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case.

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—section 647.

See Guardian and Wards Act, 1890 ... 101

**Code of Criminal Procedure (Act of V 1898).—section 4 (v)—**  
*Mukhtars—meaning of—right to practise—Legal Practitioner's Act (XVIII of 1879), section 9—powers of Mukhtars.*

*Per curiam*—A Mukhtar cannot, as a matter of right, practice in criminal courts. He can only do so if he obtains the permission of the court in each case. The word 'Mukhtar' in clause (v), section 4, of the Criminal Procedure Code also refers to such Mukhtars as have obtained a certificate of qualification from the High Court.

Where the district Magistrate issued a notice that "Mukhtars can appear under section 4 (v) only with the court's permission," *held* that he did not act without jurisdiction.

*Per BANERJI, J.*—If permission, to act in a criminal case is asked for by a Mukhtar who holds a certificate empowering him to practice, such permission should not be refused except for valid reasons.

*Per RICHARDS, J.*—In considering whether or not permission should be granted to a Mukhtar who has qualified himself with a certificate provided by the Legal Practitioner's Act, the court ought to consider every application on its merits.

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**sections 123—**  
**387—detained in custody—failing to give security—**  
*nature of imprisonment—second sentence—how to be carried into effect.*

The words "committed to prison" used in section 123 (1), Code of Criminal Procedure, 1898, are equivalent to a sentence of imprisonment, and do not merely mean committed to custody. The words, "detained in prison" in sub-section (2) have also a similar meaning. A person failing to give security for his good behaviour is liable to imprisonment and the imprisonment takes effect from the day on which the warrant of the Magistrate directing detention in prison has been executed.

*T* was required to furnish security to be of good behaviour or be rigorously imprisoned for three years. The order was submitted to the Sessions Judge, and *T* was ordered to be rigorously imprisoned, pending the order of the Sessions Judge. In the meantime *T* was convicted for another offence by another Magistrate. *Held*, that the former sentence should be carried out first. F.B.

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**section 133—Ap-**  
*plication for jury—Verdict binding.*

One *R* was called upon under section 133 of the Criminal Procedure Code to show cause why an obstruction should not be removed from a public way. His *mukhtar-i-am* appeared and nominated certain persons to be jurors who were accepted by the Magistrate. They passed a verdict against *R*, *viz.*, that the land obstructed was a public way. *Held*, that the objection was such as could be left to the jury to decide. *Kailash Chunder v. Ramlal*, I. L. R., 26 Cal., 869, referred to.

A person who applies for a jury is bound by the verdict of a jury and cannot raise a plea that the obstruction was

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caused in the exercise of a *bona fide* claim of right. *In the matter of the petition of Lachman*, A. W. N., 1900, 180, referred to.

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**section 145.**

See Specific Relief Act, 1877, section 9 ... 297

**section 185.**

See Section 179 ... 333

**sections 179 and**

**185—Hundis issued from Hathras—fraudulently cashed at Calcutta—Jurisdiction of Aligarh Court—Penal Code (Act XIV of 1860), section 415.**

G purchased certain *hundis* at Hathras and sent them to B at Calcutta. B became an insolvent but cashed the *hundis*. G filed a complaint against B at Aligarh, charging him with cheating inasmuch as he had realised the money from the drawees at Calcutta after becoming insolvent: *Held*, that the court at Aligarh had no jurisdiction to try the case which should be tried at Calcutta. The words “and of any consequence which has ensued” in section 179 of the Code of Criminal Procedure, embrace only such consequences as modify or complete the act alleged to be an offence. A Magistrate when he acts upon a complaint is confined to the four corners of the complaint.

The act or omission causing damage within the meaning of section 415 of the Penal Code is the act in the case of the person who handed over the proceeds of these *hundis* and damage or harm is the damage or harm to that person. *Q. E. v. O'Brien*, I. L. R., 19 All., 111, distinguished.

BABULAL *v.* GHANSHAM DAS ... 333

**section 195—form**

*of the order.*

An order sanctioning prosecution did not specify the court or other place, in which and the occasion on which the offence was committed. *Held*, that the order was defective.

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**sections 195, 439**

**—Power of High Court—Order by Judge refusing to set aside an order sanctioning prosecution—Revision—Order not specifying the place and occasion of offence—defective.**

When a Sessions Judge refuses to interfere in the order of a Magistrate sanctioning prosecution, the High Court has power to call for and examine the record and pass such orders as a court of appeal could have passed, under section 195 of the Code of Criminal Procedure. *Kusal v. Badri*, A. W. N., 1907, p. 223; *Muthuswami v. Veeni*, I. L. R., 30 Mad., 382, referred to.

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**section 195.**

See Section 476 ... 562

**section 195.**

See Section 439 ... 749

**Code of Criminal Procedure (Act V of 1898),—(contd.)**

**section 202**—*Dismissal of complaint—further enquiry ordered without notice to accused—notice unnecessary.*

The Magistrate before whom a complaint was laid after issuing notice to the accused dismissed it under section 203 of the Code of Criminal Procedure. The District Magistrate, however, ordered further enquiry but issued no notice to the accused to show cause. The case was made over to another Magistrate for further enquiry.

*Held*, that no notice was necessary, the proceedings having reached no further stage than they did. *Emperor v. Tubarak Zaman*, [1907] A. W. N., 286, referred to.

It is impossible to lay down a general rule that in every case the Magistrate exercises a wrong discretion if he orders further enquiry without notice being sent to the accused. The safer and more convenient course is to send such notice.

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**sections 222, 233, 234, 235**,—*three distinct offences of criminal misappropriation and two distinct ones of forgery cannot be tried together.*

The accused was charged with having committed three separate acts of misappropriation within one year. He was also charged with having committed two separate offences of forgery. All these five offences were tried together at one and the same trial. *Held*, that the joint trial could not be supported, as the series of acts charged did not form the same transaction.

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**section 222.**  
See Section 235 ... 400

**section 233.**  
See Section 235 ... 400

**section 234.**  
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**section 271**—*Statement not recorded—Procedure.*

Section 271 of the Code of Criminal Procedure provides that when the court is ready to commence a trial, it shall read out and explain the charge to the accused and record his plea of guilty or not guilty. When the Sessions Judge does not record any plea, he does not comply with the provisions of the section. When an accused instead of pleading guilty makes a long and rambling statement more or less admitting his guilt, the Judge ought to record a plea of not guilty and proceed to try the case. *Queen Empress v. Bhadu*, I. L. R. 19, All., 119, referred to.

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**sections 271 (2), 342**—*Accused pleading guilty—procedure postponing conviction to allow confession to be considered against co-accused—General examination of the accused.*

When an accused person pleads guilty, the court should record the confession and forthwith convict him thereon. If there are other persons being tried with him for the same offence, the court should not postpone his conviction merely

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for the purpose of allowing the statements he may have made to be considered against the co-accused. It is against the spirit of law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence. *Queen Empress v. Pallua*, I. L. R., 23 All., 53, referred to.

The general examination of the accused provided for by section 342 can be made only for the purpose of enabling the accused to explain the circumstances appearing against him in evidence. The court should not ask a confessing accused "who were with you in the dacoity?"

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**—section 337—**

*Oral sanction of District Magistrate—pardon—legal—statement on oath of approver—admissible against him when pardon forfeited—joint trial—irregularity.*

There is no provision of law in the Criminal Procedure Code which lays down that an approver to whom pardon has been tendered and who does not fulfil the conditions on which the pardon was tendered cannot be tried at the same trial with the other accused. Where, therefore, an approver whose pardon was forfeited was tried along with the other accused, *held* that the joint trial did not vitiate the proceedings.

The provisions of section 337 of the Code are very salutary provisions, the neglect of which may lead to difficulties. But where a confession was made before a Magistrate who with the oral sanction of the District Magistrate tendered, the accused confessing his guilt, a pardon which was accepted but which was subsequently withdrawn : *held*, that the statement made by such an approver on oath could be used in evidence against him when he was subsequently tried. *Held*, further that the tender of pardon although irregular was legal. *Queen-Empress v. Chidda*, I. L. R., 20 All., 40, distinguished.

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**—section 342.**

See Section. 271 (2) ... 505

**—section 397.**

See Section 123 ... 318

**—section 439, 195**

*—Sanction—Miscellaneous proceedings—Code of Civil Procedure (Act XIV of 1882), section 622—Revision—Charge—Legal Practitioner's Act (XVIII of 1879), section 14.*

A pleader purporting to act on behalf of a lady filed a compromise. The lady complained to the Subordinate Judge that she had not authorised the pleader to compromise but the application was "shelved." The lady then complained to the District Judge who directed an enquiry by the Subordinate Judge. The Subordinate Judge then held an enquiry and examined certain witnesses on behalf of the lady. He disbelieved the applicant, who was a witness, and on the application of the pleader, sanctioned his prosecution. This order was confirmed by the District Judge. *Held* that the High Court could not revise this order under section 439, Criminal Procedure Code. *Salig Ram v. Ramjital*, I. L. R., 28 All., 554, (F. B.) referred to. *Held* further that no revision lay on the civil side, as the courts below had not acted without jurisdiction. *Held* further that the shelving of the

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first complaint was not a refusal to entertain the charge, and this complaint followed by the communication from the District Judge amounted to a "charging of the pleader in the court of the Subordinate Judge" within the meaning of section 14, Legal Practitioners' Act.

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**—section 439.**

See Sec. 195 ... 247

**—sections 476,**

**195—Sanction refused by a Magistrate of first class—Power of District Magistrate.**

A District Magistrate has no jurisdiction to entertain an application for sanction to prosecute a complainant, refused by a Magistrate of the first class who tried the case and from whose order appeals ordinarily do not lie to the District Magistrate. If he entertains such an application, his order is *ultra vires*. Held, further that he has no power to entertain such an application under section 476 of the Code of Criminal Procedure as the offence was not committed before him.

MIHI LAL v. LARETI PRASAD ... 562

**—section 498—Bail**

*in non-bailable offences—Discretion—exercised by the Judge.*

Section 498 of the Code of Criminal Procedure gives the Court of Sessions and High Court very wide powers to admit an accused to bail even when he is charged with a non-bailable offence. The admission to bail is a matter within the discretion of the Sessions Judge. In this case the Judge having exercised his discretion with proper care, the High Court refused to interfere.

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**—section 556—**

*Excise officer ordering prosecution—trial by him as magistrate.*

Section 556 of the Code of Criminal Procedure does not preclude a magistrate from trying a case under section 52 of the Excise Act in which the prosecution was ordered by him as an Excise officer.

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**Companies Act (VI of 1882)—right to inspect books and registers of the company.**

See Corporation ... 463

**Compromise—construction.**

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*—mutation proceedings—admissibility to vary terms of a registered instrument.*

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*—widow—effect of decree—Hindu Law—reversioners.*

See Hindu Law—Reversioners ... 43

*—by a widow in suit followed by decree, effect of—Reversioners—Hindu Law.*

See Hindu Law—Reversioners ... 43

**Contract—minor—joint Hindu family.**

The ruling in *Mohori Bibi v. Dharmo Das Ghose*, I. L. R., 30 Cal., 539 (P. C.) only declares that a contract made by a minor is void and not voidable, and does not apply to the case in which a contract is entered into by persons of full age on behalf of a minor belonging to a joint family.

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**—principal and agent—ratification.**

Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. A woman, with a limited interest, could not, by acts *ex post facto*, charge upon the estate which she represents, obligations not originally binding upon it.

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU ... .. P. C. 184

**—principal and surety—Admission of the principal debtors.**

In an action against a surety, the liability must be proved against the surety independently of any admissions by the principal debtor which are in law no evidence against the surety. *Ex parte Young*, L. R., 17 Ch. D., 668, referred to.

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**—public policy—sale-deed of property subject to litigation.**

See Champarty ... .. 184

**Contract Act IX of 1872, section 11.**

See Estoppel ... .. 674

**—section 25—Agreement to pay a barred debt—Express contract—Consideration valid**

Defendant executed a *sarkhat* in favour of plaintiffs' firm, in respect of a barred debt due by him to the firm, stating that no interest was to be paid. *Held*, that in order to maintain the suit, it was necessary to show express promise to pay, and not only that the intention to pay was deducible from the language of the acknowledgment. *Held*, further, that to hold that whenever there was a clear acknowledgment of a debt whether time-barred or not, that was equivalent to a promise to pay upon which a suit might be maintained, would be to nullify the effect of section 19 of the Limitation Act. *Held*, further, that under section 25 (3) of the Indian Contract Act, a promise, made in writing, and signed by the person to be charged therewith to pay a barred debt was a good consideration, but there must be a distinct promise and not a mere acknowledgment. *Mam Rum Seth v. Seth Rup Chand*, I. L. R., 33 Cal., 1047 (1058) distinguished.

GOVIND DAS *v.* SARJU DAS ... .. 274

**—sections 69, 70—Fictitious assignee of judgment-debtor—Right to make payment.**

In order to get the benefit of section 69 of the Contract Act, the party making a payment on behalf of another, before he can recover the amount so paid, must show that he had an interest in making the payment. *Ram Tahal v. Biseswar Lal*, L. R., 2 I. A., 13; *Chedda Lal v. Bhagwan Das*, I. L. R., 11 All., 234, followed.

A fictitious assignee of mortgagee rights from a judgment-debtor has not such an interest in discharging a debt as would give him the benefit of sections 69, 70. of the Contract Act.

JANKI PRASAD SINGH *v.* BALDEO PRASAD TIWARI ... 163

**Corporation**—*Share-holder—Right to inspect books and registers of the company—Mandamus—Indian Companies Act.*

The respondent, who was a share-holder in the appellant Bank, claimed an absolute and unqualified right to inspect the register of the share-holders of the Bank on the ground of generally improving the administration of the corporation's affairs.

*Held*, that the respondent had no special interest other than, or different from, that of each member of the Corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate. *Rex v. The Merchant Tailors Co.*, 2 B and Ad., 115, referred to. "The only right the respondent can have, therefore, against the Bank in reference to such matters, is that which at common law belongs to every member of a corporation."

*Held* also that the suit was in its nature, though not in form, somewhat of the character of an application for a writ of *Mandamus* and could not be sustained. One of the principles regulating the issue of the writ is that "the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the court, that he has claimed to exercise that right and none other and that his claim has been refused.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI, ... P. C. 463

**Co-sharers**—*Joint property—building by one without the consent of other—no direct loss—Injunction.*

See Joint Property ... .. 93

**Costs**—*of objections under section 278, Code of Civil Procedure, not allowed in execution department—right to sue.*

See Right to sue ... .. 140

**Court-Fees (Act VII of 1870), section 7, clause 1**—*Mortgage—sale—prior mortgages—no relief—redemption—fee payable on the plaint.*

Plaintiffs brought a suit for sale upon a mortgage. It was discovered that there were two prior mortgages on the property in respect to which no relief was claimed and no court-fee paid. The court below, however, decreed the suit and held the plaintiff entitled to redeem the prior mortgages without directing the sale to satisfy those debts. *Held* that the court-fee, paid on the plaint, was sufficient having regard to the relief claimed.

INDAR SEN SINGH *v.* RIKHI SINGH ... .. 16

**section 7—clause V**—*Suit for possession under lease—whether it is a suit for specific performance.*

A suit for possession by the lessee of land comprised in a lease is not a suit for specific performance of the contract of lease, and the court-fee payable on the plaint is the same as in a suit for possession. But the memorandum of appeal must be stamped according to the value of the relief asked for, which may be the lease money.

GHULAM SABIR *v.* NARAIN PRASAD ... .. 535



**Court Fees Act VII of 1870.—(contd.)**

**section 7—clause IX—***applies to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in appeal.*

*Held*, that the court-fee in an appeal arising out of a suit for foreclosure is payable on the subject-matter in dispute in appeal and not on the principal money secured by the mortgage. *Nepal Rai v. Debi Prasad*, I. L. R., 27 All., 447, and *Reference under Court Fees Act*, I. L. R., 29 Mad., 367, followed.

**IN THE MATTER OF THE PETITION OF MAHADEO PRASAD** 531

**schedule II, clause II—***Appeal in a suit for partition—Remand to carry out the partition—Appeal from order of remand—Court-fee payable on memorandum of appeal.*

In a suit for partition the plaintiffs claimed a half share of the property. The Munsif found that they were entitled to a half as claimed. On appeal the District Judge found that they were entitled to a quarter, and remanded the suit for carrying out the partition. The plaintiffs appealed and challenged the decree on the merits but paid a court-fee of Rs. 2. *Held*, that the plaintiffs should have appealed from the decision as from a decree and the memorandum of appeal must be stamped as such. *Kedar Nath v. Lalji*, [1889] A. W. N., 198, followed.

**UMRAO ALI KHAN v. ABDUL SUBHAN KHAN** ... 545

**schedule II, art. 17, clause I—***Code of Civil Procedure (Act XIV of 1882), section 283—Valuation of suit.*

Where a party prefers a claim to any property in execution of a decree but fails to establish it and brings a suit to establish the right, the suit is of the nature described in section 283 of the Code of Civil Procedure. The plaint is governed by the first head of Article 17, of schedule II, of the Court Fees Act, and is chargeable with only a ten-rupee stamp.

The value of the action must mean the value put by the plaintiff, and the sum in the execution of the decree is not the criterion. There is in the statute no general or over-riding reference to value. The terms of sub-section 1 of article 17 contains no reference to value. In short, the statute, for good reasons or bad, has dealt with certain actions irrespective of value; and the present action is one of them.

*Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni*, I. L. R., 9 Bom., 20, approved.

**BIBI PHUL KUNWAR v. GHANSHYAM MISR,** P. C. 10**Custom—Adoption—Jains.**

See Hindu Law—adoption ... 200

**inheritance—exclusion of daughters—Bhale Sultan Chhatris.**

See Hindu Law ... 1

**abrogation—pre-emption—perfect partition.**

See Pre-emption ... 79, 539

**second appeal—question of law.**

See Code of Civil Procedure, 1882, section 584 ... 456

**Daughters—exclusion from inheritance—custom—Bhale Sultan Chhatris.**

See Hindu Law ... 1

**Debt**—*mortgagee not advancing the entire amount—Balance whether debt.*

See Code of Civil Procedure, section 266 ... 491

**Declaratory suit**—*Limitation.*

See Limitation Act, 1877, schedule II, article 120 ... 637

**Decree**—*suit to set aside—No fraud—Right to sue.*

*H* instituted a suit for redemption which was decreed. The decree was affirmed on appeal by the High Court. On appeal to the Privy Council, the decree of the High Court was reversed, the Privy Council directing that an account should be taken of the defendants' receipts and payments under the mortgage deed and the ultimate balance due should be certified. *H* had died before the High Court gave its decision, and his three minor sons were substituted on the record, and their mother appointed as their next friend. She had also been appointed by the District Judge as their guardian under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, the High Court transmitted their order to the court below under section 610 of the Code of Civil Procedure with directions to carry it into execution. A pleader appeared for the minors in these proceedings but on the 9th of May, 1905, after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, the pleader informed the court that he had no instructions and could not proceed further. The court, however, after considering the accounts passed a decree on the 16th of May 1905. Meanwhile the mother of the minors had made an application to the District Judge stating that one of the minors had attained majority and praying that he might be appointed in her place guardian of the other two minors. This application was granted on the 3rd of February 1904. The Subordinate Judge was not informed of this, nor was any application made on behalf of the two minors for substitution of their major brother as their next friend in place of their mother, who accordingly continued to be their next friend in the case pending before the Subordinate Judge. Then the major son of *H* applied on his own behalf and on behalf of his minor brothers for a re-instatement of the case and a re-hearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the Subordinate Judge. This application was refused and no appeal was made against the order refusing it. Then the present suit was commenced, the sole prayer for specific relief being that the decree of the 16th of May 1905 may be set aside.

*Held* that the suit did not lie inasmuch as the only relief claimed was that the decree passed by the court may be set aside. Even if fraud on the part of the defendant had been alleged, the court would not have any jurisdiction to set aside the decree. If other relief had been prayed for, and there were proof of fraud in obtaining the decree, it might be open to the court to treat the decree as a nullity and to give suitable relief. But fraud not having been alleged or proved and no specific relief having been asked for except the setting aside of the decree, the suit could not be decreed. *Umrao Singh v. Hardeo and another*, 1. L. R., 29 All., 418, referred to.

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**Decree.**—(contd.)

—order of remand in a suit for partition after determining the share—appeal—court-fee payable in appeal.

See Court Fees Act, 1870

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**Decree ex parte**—setting aside of—*Small Cause Court*.

See Provincial Small Cause Court, 1887, section 25

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**Deed**—construction.

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**Dower**—debt—*Succession Certificate Act, 1889, section 2*.

See Succession Certificate Act, 1889, section 2

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**Ejectment**—landlord and tenant—right of the tenant in the abadi—partition between co-owners—liability to pay rent.

See Landlord and tenant

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**Endowment.**

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**Escheat**—to the Crown—mortgage by fixed rate tenant—fixed rate tenant dying childless—redemption by zamindar.

See Transfer of Property Act, 1882, section 91

... 579

**Estoppel**—minor—false and fraudulent misrepresentation by a minor—Principle of liability—test applicable to such cases. *Contract Act (IX of 1872) section 11—Contract by a minor—Indian Evidence Act, section 115.*

*Per BANERJI, J.* When a plaintiff made false and fraudulent representations as to his age with a view to induce the defendant at first to lend him and afterwards to purchase his property, held that in a suit to recover the property upon the ground that the contract was by reason of his minority void, the plaintiff was liable in equity to make restitution of the benefit he had obtained. *Mohori Bibee v. Dharmo Das Ghose*, 1. L. R., 30 Cal., 539, distinguished. In a case like this the liability attaches to a minor not on the ground of estoppel but on the ground that an infant shall not take advantage of his own fraud. *Stikeman v. Dawson*, 16 L. J. Ch., 205, followed.

*Per RICHARDS, J.* Even assuming that an infant is liable for fraudulent misrepresentation in an action for deceit, and that the fraud of an infant may be set up as a defence when the infant seeks to set aside a transaction induced by his fraud, a fair test in a case when the infant sues to recover property sold by him, for awarding restitution of the money to the vendee, is to consider whether the defendant vendee on the evidence could succeed if he were suing as plaintiff in a suit for damages for fraudulent misrepresentation. The vendees in the present case not having proved that they were induced to enter into the contract of sale by the fraudulent misrepresentation of the minor plaintiff were not entitled to restitution of money. *Mohori Bibi v. Dharmo Das Ghose*, 1. L. R., 30 Cal., 539; *Thurston v. Nottingham Building Society*, [1902] Chan. 1, and [1903] A. C., 6, referred to.

*Obiter: Per BANERJI, J.* "I do not deem it necessary to express any opinion on the point, although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants."

*Per RICHARDS, J.*—"In my opinion the ordinary law as to estoppel does not apply to infants."

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**Estoppel.**—(contd.)

*Representation by a widow that she was competent to adopt—Evidence Act (I of 1872), section 115—Adopted son borrowing money and incurring other expenses on faith of representation—Subsequent denial of authority to adopt.*

Where a widow represented that she had authority to adopt and the ceremony of adoption was carried out on the faith of this representation, the marriage of the adopted son was celebrated by the adoptive mother; the adoption was challenged by a reversioner and the adopted son in order to defend his right incurred heavy liabilities; *held* that the adoptive mother was estopped from maintaining a suit for a declaration that she had no authority to adopt. *Kannamal v. Virasami*, I. L. R., 15 Mad., 486; *Rangi Vinyak v. Lakshmi Bai*, I. L. R., 11 Bom., 381; *Sani Appayya v. Ramgopppaya*, I. L. R., Mad., 397; *Thakoor Oomiao Singh v. Thakooranee Mehtab Kunwar*, [1868] N.-W. P., H. C. R., 103; *Durga v. Khushali*, [1882] A. W. N., 97; *Sukhbasi Lal v. Guman Singh*, I. L. R., 2 All., 366; *Sarat Chandar v. Gopal Chandar*, I. L. R., 20 Cal., 296 at 311; referred to.

*DHARAM KUNWAR v. BALWANT SINGH* ... 568

*Fictitious mortgage—fraud by the mortgagor—right of the mortgagee.*

See Transfer of Property Act, 1882, section 35 ... 305

*Pre-emption purchaser not entitled to say that there was no sale.*

See Pre-emption ... 182

**Evidence Act (I of 1872), section 32 (5)**—Ante litem motam—*Pedigree—Admission in court—Estoppel.*

Where the plaintiffs had adduced oral evidence in support of certain pedigrees filed by them in the first court, and got a decree from that court on the basis of their evidence, but at the hearing of a first appeal against that decree were said to have made "practically no attempt to support the finding of the Subordinate Judge," *held* in view of all the circumstances that the plaintiffs were not estopped from endeavouring to sustain that finding upon further appeal to the Privy Council.

Where pedigrees are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but are documents drawn up on a particular occasion for a specific purpose by members of the family, they must be treated as mere declarations made by the persons who respectively drew them up or adopted them.

In order to make a declaration, made or adopted by a deceased member of a family touching the family reputation or tradition on the subject of its descent, inadmissible on the ground of having been made *post litem motam*, the same thing must be in controversy before and after the statement is made. *Freeman v. Phillips*, 4 M. & S., 486; *Shrewsbury Peerage*, 7 H. L. C. 1; *Duke of Devonshire v. Neill*, 2 Ir. L. R., 132, referred to.

*KALKA PRASAD v. MATHURA PRASAD* P. C. ... 701

**section 91**—*Promissory note, loss of—proof of contents.*

Where a plaintiff bases his cause of action on a promissory note, which he alleges had been lost, he cannot prove the contents, unless he succeeds in proving the loss of the

**Evidence Act (I of 1872)—*contd.***

document, apart from the note in which the contract was recorded. *Banarsi Prasad v. Fazl Ahmad*, I. L. R., 28 All., 298, distinguished.

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**section 92—Registration Act (III of 1877), section 17, cl. (b)—Variation of terms of registered deed—Compromise in mutation proceedings—Varying the terms of registered deed—admissibility of.**

A mortgage was executed by one mortgagor on condition that the property could not be redeemed within 25 years. In the revenue court a co-owner of the mortgagor objected to mutation of names. The matter was compromised, the condition being that the objector withdrew his objections and the mortgagees' names were entered in the revenue registers and it was provided that the mortgage could be redeemed in *lath* of any year. In a suit for redemption brought within 25 years, *held*, that the compromise could not be admitted in evidence inasmuch as it purported to modify the terms of the registered mortgage, and that the terms of a registered deed of mortgage could not be varied except by a registered instrument.

SADARUDDIN AHMAD *v.* CHHAJJU F. B. ... 717

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**section 92.**

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**section 115.**

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**section 115.**

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**Excise Act (XII of 1896), sections 44 (2), 48, 57—Sub-Inspector—Excise Officer.**

When the police arrested a man with 18 tolas of *charas* and through their official superior brought the accused before a Magistrate, *held*, that there was sufficient compliance with the provisions of sections 44 and 57 of the Excise Act, and the accused could be tried by such a Magistrate. *Queen-Empress v. Makunda*, I. L. R., 20 All., 70, followed.

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**section 57.**

See 44 (2) ... .. 444

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**section 52.**

See Code of Criminal Procedure (1908) Sec. 556 ... 357

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**Execution of decree—Ambiguity—Reference to pleadings.**

A suit was brought for possession of a courtyard, demolition of *chabutra* and removal of certain *parnalas*. The court of first instance decreed it in respect of the first two and dismissed the relief about *parnalas*. The defendant appealed and the plaintiff filed objections. The appellate court "dismissed the appeal and allowed the objections" but did not specify the nature of the relief which was accorded to the plaintiff.

**Execution of decree—(contd.)**

*Held* that there was not such an ambiguity in the decree as would prevent the court in execution from giving effect to it. *Kalp Kuar v. Bisheshar*, A. W. N., 1890, p. 75; *Jawahir Mal v. Kistur Chand*, I.L.R., 13 All., 343; *Lachmi Navain v. Jawala Nath*, I. L. R., 18 All., 344; *Hursarun Singh v. Purshun Singh*, [1870] 2 N.-W. P., p. 415; referred to.

NISAR HUSAIN *v.* ALLAH BAKHSI ... 742

**Full Bench reference—Bench not constituted—Powers and duties of Division Bench.**

See Code of Civil Procedure, 1882, Sec. 244 ... 285

**Gambling Act (III of 1867)—Search warrant issued to Police Officer by Magistrate—Such Police Officer endorsing it for execution to another Police Officer—Legality of execution of search by the Police Officer.**

Search warrants issued under Act No. III of 1867 (Gambling Act) are governed by those provisions of the Code of Criminal Procedure which provide for the issue of the warrants in general. Consequently, a search warrant may be endorsed by a Police Officer to whom it was originally directed to another who is not of a rank below that authorized under the Act to enter and search.

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**Gharghanna cess.**

See Land Revenue Act, 1901, Sec. 56 ... 361

**Gift.**

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**Graft—doctrine of—**

See Hindu Law—Alienation—widow ... 590

**Grant of superior proprietary rights to the Hindu widow of an inferior proprietor—nature of estate taken by widow in such grant.**

See Hindu Law—Alienation—widow ... 590

**Guardian and Wards Act (VIII of 1890)—Rival claimants for guardianship—Arbitration—Power to refer dispute to arbitration—Code of Civil Procedure (Act XIV of 1882), section 647.**

*Per curiam*—Rival claimants, to be appointed as guardian of a minor, are not in the position of ordinary litigants and cannot refer the matter in dispute to arbitration. The guiding principle, in appointing guardian, is the consideration what is best for the welfare of a minor.

*Per KARAMAT HUSAIN, J.*—Section 647 of the Code of Civil Procedure deals with procedure and procedure alone and does not touch the substantive law of arbitration. The consent of parties, in a proceeding for appointment of guardian, does not give the Judge any power to refer the matter to arbitration.

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**Guardians and Wards Act (VIII of 1890)—(contd.)****section 29.**

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**section 31**

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**sections 55, 29, 31**

—*Interest, rate of—Bond by guardian with permission of the Judge—Duty of Judge while giving permission.*

*Held*, that while giving permission to a guardian to borrow money for the purposes of the minor, the Judge is bound to specify the rate of interest, and the amount to be borrowed. These should not be left to the discretion of the guardian.

A creditor is not bound to see to the application of the money borrowed with the permission of the Judge. It is only necessary for him to prove that he lent the money relying on the Judge's permission.

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**Hindu Law**—*adoption—Jains—custom of adoption of a married man of 23 years—Onus of proving invalidity—Senior widow can adopt—Junior widow's consent not necessary—Giving away a son by mother without permission of husband.*

Where a Jain widow adopted a married man of 23 years of age, and such adoption was challenged by the plaintiff and supported by the defendant who relied on a custom among the Jains permitting such adoption, *held* on the evidence that the custom had been established and that a married man may validly be adopted among the Jains. *Manohar Lal v. Banarsi Das*, 1. L. R., 29 All., 495, followed. In Jain cases, it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation.

Where the plaintiff, who claimed to be the reversioner of a Jain, brought a suit during the widow's life-time, asking the court to declare that she had not adopted the defendant-respondent and that if she had adopted him, his adoption was invalid, *held* that the *onus* lay on the plaintiff to prove the invalidity. *Brojo Kishoree Dassee v. Sreenath Bose*, 9 W. R., 463; *Sardar Singh v. Ram Kunwar*, A. W. N., 1902, p. 62, followed. *Tarinee Churn Chowdhry v. Sharoda Sooduree Dossee*, 11 W. R., 468; *Chowdry Pudum Singh v. Koer Oddey Singh*, 12 W. R., 1 P. C.; *Gooroo Prosunno Singh v. Nil Madhub Singh*, 21 W. R., 84, and *Hur Dyal Nag v. Roy Krishto Bhoomick*, 24 W. R., 107, distinguished. The principle upon which the *onus* is fixed resembles that according to which a plaintiff who sues to set aside deeds, is bound not merely to prove his heirship but must give some evidence to impeach the deeds, before he can throw the *onus* of showing a better title on the defendant. *Tucoor-deen Tewarry v. Nawab Syed Ali Hossein Khan*, L. R., 1 I. A. 192; S. C. 21. W. R., 340.

A senior Jain widow can adopt a boy without the consent of her co-widow.

A widow may give her son in adoption without any permission derived from her deceased husband. *Sri Balusu Gurulingaswami v. Sri Balusu Rama Lakshmanamma*, 1. L. R., 22 Mad., 398, P. C.; *Radha Mohun v. Hardai Bibi*, 1. L. R., 21 All., 460; *Raja Upendra Lal Roy v. Srimati Rani Prasanna Mayi*, 1 B. L. R., 221, referred to.

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**Hindu Law—(contd.)**

- *Adoption—widow—authority to adopt—representation by widow that she was competent to adopt—adopted son borrowing money and incurring other expenses on faith of representation. Subsequent denial of authority to adopt.*  
 See Estoppel ... .. 568
- *Alienation by father—Mortgage—Redemption—suit against Hindu father—son not party—right of the son to redeem.*  
 See Mortgage—redemption ... .. 267
- *Alienation—mortgage by uncle—for personal benefit.*  
 Appellant held a decree against his uncle Gendan and got him arrested in execution. Gendan Lal in order to pay him executed a mortgage bond hypothecating a joint family property to the respondent. The joint family consisted of himself and appellant. The creditor sued appellant who pleaded that his uncle could not hypothecate joint family property to pay up a decree which he (appellant) held against him.  
*Held* (STANLEY, C. J. and BANERJI, J.), that appellant's plea must prevail.  
 Distinction between powers of a manager who is a father and a manager who is not a father, pointed out.  
 RAM RATAN *vs.* LACHMAN DAS ... .. 417
- *Alienation—widow—Onus probandi—legal necessity.*  
 One who claims title under a conveyance from a woman with the usual limited interest, and who seeks to enforce the title against reversioners, is always subject to the burden of proving not only the genuineness of the transaction but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity. This burden lies the more heavily on one who comes into court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.  
 RAJA RAI BHAGWAT DAYAL SINGH *vs.* DEBI DAYAL SAHAN ... .. P. C. ... 184
- *widow—alienation by—necessity—reversioner—right to set aside sale.*  
 When a Hindu widow sells property for a consideration the whole of which was advanced by the vendee for legal necessity, a reversioner cannot get the sale set aside even on payment of the entire sale price. *Govind Singh v. Baldeo Singh*, 1. L. R., 25 All., 330; *Ramdei v. Abu Jufar*, 1. L. R., 27 All., 494, distinguished.
- RAGHUBAR DAYAL *vs.* AKHTAR KHAN ... .. 366
- *Mitakshara—alienation—widow—consent of reversioners—legal necessity.*  
 A Hindu widow, governed by the law of Mitakshara, can alienate her husband's property without legal necessity on obtaining the consent of the whole body of persons constituting the next reversion and it is not necessary for her to obtain the consent of all his kindred who can reasonably be regarded as having an interest in questioning the transaction. *Rampthal Rai v. Tula Kuuri*, 1. L. R., 6 All., 116, not approved. *Radha Shyam v. Joy Ram*, 1. L. R., 17 Cal., 896, approved. *Nobo Kishore v. Hari Nath*, 1. L. R., 10 Cal., 1102;



**Hindu Law—(contd.)**

*Narudu Mathu v. Srinivasa*, I. L. R., 21 Mad., 128; *Vinayak v. Govind*, I. L. R., 25 Bom., 129, referred to.

BAJRANGI SINGH and others *v.* MANOKARNIKA BUKSH SINGH ... .. P. C. 1

—alienation—widow—husband being inferior proprietor—death of the husband—subsequent—grant by Government to Hindu widow of superior proprietary right—Nature of estate taken by widow in such grant—Graft—Trust.

J's husband and some other persons were inferior proprietors (*Mukaddams*) of a village. After death of J's husband, Government conferred the *zamindari* rights upon J and these other persons. *Held*, that the inferior proprietors acquired these *zamindari* rights by virtue of and not independently of their pre-existing estate, the inferior estate thus becoming merged as it were in the superior interest. J therefore could not deal with the estate as her absolute property.

*Per* STANLEY, C. J. Even if the act of Government amounted to a grant of the *zamindari* rights to J, the doctrine of *graft* would be applicable and she became a constructive trustee of the rights so acquired for the parties entitled to the whole interest. *Keech v. Sandford*, 2 Wh. and T. Eq. C., 693, referred to.

KASHI PRASAD *v.* INDAR KUNWAR ... .. 590

—Debts—Son's liability for father's debts—Burden of proof—immorality—antecedent debts.

In a suit by a creditor against the sons of a Hindu debtor, the burden of proving that the debt was tainted with immorality lies on the son. It is not for the creditor to prove that the debt was contracted for payment of antecedent debts or that the family stood in need of money, and that the debt was taken for such necessity. *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508, not followed. *Debi Das v. Jado Rai*, I. L. R., 24 All., 459, followed. General evidence of the profligacy of the father is not sufficient to exonerate the sons of the debtors from their pious duty to pay their father's debts.

BABU SINGH *v.* BEHARI LAL ... .. 175

—debts—satisfied by a wife in her husband's life-time—Voluntary payment—Transfer of husband's property after his death. Equity—liability to pay the consideration money—Joint family—nature of.

The existence of debts due by the ancestor at the time of his death is a condition precedent to the liability of the heir to pay them. When a husband's debts were paid by a wife in the life-time of the husband, the payments were voluntary payments and the husband's property could not be made liable for those debts after his death. A transfer of property for payment of those debts could not be deemed to be a transfer made for payment of his debts.

During the life-time of N, his wife M paid his debts. After his death when she inherited his property she transferred certain property to satisfy those debts. Plaintiffs, the daughter's sons of N, sued to set aside that sale. *Held*, that the plaintiffs were not bound by the sale as the payments by M were only voluntary, and the property could not be

**Hindu Law**—(*contd.*)

made liable for the debts, but the plaintiffs were in equity liable to pay the whole consideration money which the transferee had paid.

Nature and incidents of a joint Hindu family governed by the Mitakshara considered.

HIMMAT BAHADUR *v.* BHAWANI KUNWAR ... 339

— *debt due by a widow—Legal necessity—Only life estate saleable in execution.*

When a creditor lends money to a Hindu widow on her personal security and not upon any mortgage of her husband's property, any decree which he obtains on his simple money bond can only bind the rights and interests of the widow, even though the loan was incurred by her for legal necessity. *Dhiraj Singh v. Manga Ram*, [1897] A. W. N., p. 67, followed. *Mayne's Hindu Law*, para. 64, 7th edition, referred to.

KALLU *v.* FAIAZ ALI KHAN ... 367

— *gift in favour of widow—construction—Malik—meaning of.*

Where the words *Malik wa khud ikhtiyar* are used in a deed of gift in favour of a Hindu widow, they import an idea of full proprietary rights, and unless there is something in the context to qualify her rights she takes an absolute interest in the property. *Kollany Koer v. Luchmee Pershad*, 24 W. R., 305; *Lalit Mohan v. Chukkon Lal*, L. R., 24 I. A., 76, approved. *Padam Lal v. Tek Singh*, I. L. R., 29 All., 217, referred to.

SURAJMANI *v.* RABINATH OJHA ... P. C. 67

— *Impartible estate—Previous suit compromised—effect of compromise—Interpretation.*

The widow of the last holder of an impartible estate was in possession of that estate under a will. Her husband's nephew brought a suit to contest the will and to recover possession of the impartible estate. The suit was compromised, the widow being left in possession during her lifetime of the estate as *gaddinashin*, but without the power to transfer or charge the estate in any way, an annuity of Rs. 12,000 *per annum* being settled upon the nephew, and it being declared that after the death of the widow, the nephew, or any representative (*kaim mokam*) of his, who may be alive at the time, shall be the absolute owner (*malik mustakil*) of the estate and shall occupy the *gaddi*.

*Held*, upon the construction of the compromise, that the character of the estate as it had been handed down from father to son for generations was not changed, that the nephew took an absolute vested interest in the property the enjoyment of it being postponed during the life of the widow and that upon the death of the nephew the estate devolved according to the rules of primogeniture governing impartible estates and did not pass to the widow of the nephew as an estate governed by the ordinary rules of Hindu Law.

HARPAL SINGH *v.* LEKHRAJ KUNWAR ... 425

— *Joint family—nature of*

See Hindu Law—debts ... 339

**Hindu Law—(contd.)****—Inheritance—exclusion of daughters—custom—Bhale Sultan Chhatris.**

Among the *Bhale Sultan Chhatris* of Oudh, there is a custom by which the daughters are excluded from inheriting their father's property.

BAJRANGI SINGH and others *v.* MANOKARNIKA BUKSH SINGH ... P. C. 1

**—Inheritance—Incurable disease—Virulent type—Contracting disease after inheritance, effect of.**

A Hindu is not divested of an estate if after inheriting it he contracts an incurable disease. It is only cases of virulent and aggravated type of an incurable disease that cause inability to inherit.

MURLI SINGH *v.* JAI SINGH ... 115

**—Inheritance—Mitakshara—Samanodaka—sister's son.**

Where the question was as to inheritance to the estate of one *G* deceased, who was a Hindu governed by the Mitakshara, and the plaintiffs proved that their father and the deceased were descended from one common ancestor, both being only seven degrees removed from that ancestor, *held* that the plaintiffs were entitled to succeed as against the sister's son.

KALKA PRASAD *v.* MATHURA PRASAD ... P. C. 701

**—Joint property—Agreement among the owners that shares should remain joint—not enforceable.**

There were four brothers jointly entitled to certain zamindari property. One of the brothers died childless. One of the brothers brought a suit against the sons of the two others for partition. A compromise was entered into among the then defendants that their shares should remain joint. The plaintiff who was a defendant to that suit now applied under section 110, Land Revenue Act, to have his share separated—

*Held*, that the application was maintainable.

The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right, and therefore, not enforceable.

CHANDER SHEKHAR *v.* KUNDAN LAL ... 670

**—Religious Endowment—Powers of a Hindu testator to place limitations—Bequest followed by endowment.**

Disputes having arisen about the management of a temple between *D*, the founder of the endowment, and others, the matter was referred to arbitration. The arbitrators decided that *D* should be the manager of the temple but made no provision as to who was to succeed him. *Held*, that the founder of an endowment had an inherent right to appoint his successor in the absence of any express provision to that effect. *D* executed a document by which he reserved the life estate in his property to himself and which was to devolve on his daughter after his death, and he directed that it was to be applied to the temple after her death. *Held*, there was no objection to the limitations by a Hindu testator or settlor or a life estate followed by an endowment of property to religious or charitable purposes, such limitation not being contrary to the rule laid down by the Privy Council in the Tagore case.

GOVIND PRASAD *v.* GOMTI ... 256

**Hindu Law**—(contd.)

————— *Reversioners—Compromise by a widow in suit followed by decree—effect of—*

*Held*, following *Gobind Krishn Narain v. Khunni Lal A. W. V.*, [1937, 151, that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of court, and that the reversioners can only be bound by a decree made after a full contest.

MAHADAI v. BALDEO ... .. 43

————— *Will—bequest to daughter—Intention of testator—construction.*

A testator bequeathed his property on the happening of certain events to his "daughters in equal shares to whom and their respective sons" he gave the same and in case any of them died childless he directed that the other daughter and her sons were to get the whole property; in case of the death of either daughter leaving sons, the share of such daughter was to be paid to such of her son or sons, share and share alike. *Held*, that the intention of the testator was to exclude the daughters' daughters from inheritance and that he only gave to the daughters a life interest in the property. *Mahomed Shamsool v. Shewak Ram*, L. R., 2 I. A., 7, referred to.

RADHA PRASAD MULLICK v. RANIMONNI DAS ... P. C. 460

**Inheritance**—*Exclusion of daughters—Custom—Bhale Sultan Chhatris.*

See Hindu Law ... .. I

————— *Shia school.*

See Mahomedan Law ... .. 543

**Joint property**—*Co-sharer building on part of the property without permission of other joint owners—No direct loss—Injunction.*

One of several joint owners of land is not entitled to erect a building on the joint property, without the consent of the other joint owners, notwithstanding that the erection of such building might cause no direct loss to the other joint owners. If one co-sharer builds without consent on the joint land, a mandatory injunction ought to be granted. *Shadi v. Anup Singh*, I. L. R., 12 All., 436; *Najju Khan v. Imtiaz-ud-din*, I. L. R., 18 All., 115, followed. Judgment of RICHARDS, J., reversed.

LACHMI v. GANGADIN ... .. 93

**Joint Trial**—*Approver—pardon forfeited—trial of approver with other accused.*

See Code of Criminal Procedure, 1882, Section 337 ... 69

**Jurisdiction**—*Cause of Action.*

See Code of Civil Procedure ... .. 89

————— *Civil Courts—Declaration of right to kill cows.*

See Code of Civil Procedure, 1882 ... .. 147

————— *Civil and revenue courts—Landlord and Tenant—Agra Tenancy Act (II of 1901), U. P., Section 79—order in ejectment—suit in civil court by lessee of tenant—res judicata.*

An occupancy tenant leased his land to the plaintiff. Subsequently he relinquished his rights in favour of the zamindar. The zamindar took proceedings in the revenue

**Jurisdiction—(contd.)**

court and got the plaintiffs ejected and put other persons as tenants of the land in dispute. In the meantime he continued to take rent from the lessees but without prejudice to his contesting the lease. *Held* that a relation of landlord and tenant subsisted between the parties up to the date when the landlord got the lessees ejected. The suit of the lessees for possession was consequently a case which was cognisable by a revenue court and was therefore barred by the rule of *res judicata* on account of the judgment of the revenue court in ejectment proceedings.

BALWANT SINGH *v.* GIRDHARI LAL ... 30

—Civil and revenue courts—Suit for declaration that lease was void.

A suit by co-sharers of a village that a lease granted by a lambardar was null and void is a suit of which the civil courts can take cognisance. *Jagannath v. Hardayal*, A. W. N., 1897, p. 207, referred to.

NIHAL CHAND *v.* RUSTAMALI KHAN ... 564

—Civil and revenue courts—Agra Tenancy Act (II of 1901), U. P., section 4 (5); section 32 (2), chapter III—Partition of rent-free holding—Suit maintainable.

Section 32 (2) does not apply to a rent-free grantee but falls within chapter III which deals with division, devolution and transfer of tenancies. A tenant does not include a rent-free grantee. A suit for partition of a rent-free holding is maintainable in the civil court. *Abdul Karim v. Ramzan*, A. W. N., [1908], p. 197, approved.

SAGARMAL *v.* MAKHAN LAL ... 734

—Civil and Revenue Courts—Partition of land assessed to Revenue (Act XIX of 1873), sections 132, 241—Land Revenue Act (III of U. P., 1901), section 233 (k).

Where the whole of a village was under partition in the Revenue court and that court directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants, for partition should consist of 12 *pattis*, but rightly or wrongly land which should have formed part of the mahal of the non-applicants was allotted to one of the other mahals, *held*, that this was question relating to the partition or union of mahals, and the remedy of the party aggrieved was an appeal against the order confirming the partition and not a suit in the civil court.

*Kishen Prasad v. Kadher Mal*, 20 A. W. N., 11, distinguished.

TERBENI SAHAI *v.* JAGANNATH ... 725

—Civil and Revenue Courts—Suit for a declaration that the plaintiff as the adopted son of a tenant was entitled to tenancy.

See Agra Tenancy Act, 1901, section 95 (b) ... 514

—Civil and Revenue Courts.

See Agra Tenancy Act, section 22 ... 738

—Criminal Offence.

See Code of Criminal Procedure, 1898, section 179 ... 333

—Suit about properties in two districts—Suit Compromised about property in one district—Effect of.

See multifariousness ... 647

**Lambardar**—*power of—granting lease of co-parcenary land for seven years.*

A lambardar has not the general power, without the consent of co-sharers, to grant a lease of co-parcenary land beyond such term as the circumstances of particular year or season may require. *Chattray v. Nawala and another*, I. L. R., 29 All., 20, followed. *Mukta Prasad v. Kampta Singh*, A. W. N., 1908, p. 277, distinguished. In this case a lease for seven years was set aside.

TIKAM SINGH *v.* KHUBI RAM ... .. 17

**Land Acquisition Act (1 of 1894)**—**Section 49**—*Land for the full and unimpaired enjoyment of the house—when a part of the house.*

Whether or not land is or is not reasonably required for the full and unimpaired enjoyment of the house is a question of fact depending upon the particular circumstances of each case. The land, which is not a house, manufactory or building in the literal sense, and which is not reasonably required for the full and unimpaired use of a house, manufactory or building, cannot be considered as part of the house, manufactory or building, within the meaning of section 49 of Act I of 1894.

The Government intended to acquire a portion of the land of the plaintiff for municipal purposes. The land to be acquired was at the end of a garden about 80 paces from the house. *Held*, that the land was not such as was required for the full and unimpaired enjoyment of the house.

NITARAM *v.* THE SECRETARY OF STATE FOR INDIA ... 166

**Landlord and tenant**—*Right of the tenant in the abadi on partition between co-owners—not affected—liability to pay rent—ejectment.*

A partition between the co-owners cannot injuriously affect the rights which a tenant possessed before a partition took place.

Where under a partition between two co-owners the agricultural holding of a tenant fell to the share of one co-owner his house in the *abadi* in the share of the other, *held* that he continued to hold the house site as an appurtenant to his holding and could not be ejected.

*Held*, further, that he was not liable to pay rent for his house site to the co-owner in whose share his house had fallen. *Panna v. Nazir Husain*, A. W. N., 1902, p. 60, doubted. *Dharam Singh v. Bhoolar*, 2 A. L. J. R., 588; *Sundar Lal v. Chajjoo*, A. W. N., 1901, p. 112, referred to.

SADDU *v.* BEHARI SINGH ... .. F. B. 237

**Tenant's right to trees on the holding—Injunction.**

The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zamindar, and that the tenant has no right to cut and remove such timber. But, in the absence of custom or of a contract to the contrary, a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists.

Hence where the courts below granted to the plaintiff, zamindar, an injunction to restrain the tenants from offering obstruction to the cutting down, and removal of the trees

**Landlord and tenant—(contd.)**

upon the holding, *held* (affirming the judgment of RICHARDS, J.) that the injunction was improper, and had been rightly refused.

GANGA DAE v. BADAM ... 99

See Jurisdiction—Civil and Revenue Courts ... 30

**Land Revenue Act, (N. W.-P. Act XIX of 1873), section 132.**

See Jurisdiction—Civil and Revenue Courts ... 725

**section 241.**

See Jurisdiction—Civil and Revenue Courts ... 725

**Land Revenue Act—(Act III of 1901, U. P.)—section 36.**

See Res judicata ... 642

**sections 56, 86—**

Gharghanna—*whether a Cess.*

*Held*, that a tax of half an anna payable to the zamindar by the tenant for occupation of house site and known as *gharghanna* was not a cess within the meaning of sections 56 or 86 of the Land Revenue Act, and the zamindar could maintain a suit for its recovery.

BALWANT SINGH v. SHANKAR ... 361

**section 86.**

See Section 56 ... 361

**section 110.**

See Hindu Law—Partition ... 670

**section 111.**

See Specific Relief Act, 1877—section 42 ... 614

**section 233A.**

See Jurisdiction—Civil and Revenue Court ... 725

**section 233A.**

See Specific Relief Act, 1877, section 42 ... 614

**Lease—Condition for payment of rent in advance—Validity of payments in advance as against an auction purchaser.**

*Bona fide* payment of rent in advance by lessees to the lessor under the condition of a registered lease before sale of the property is binding upon the purchaser as the lease being a registered one it is his duty to make enquiries whether any payment was made under its terms.

NAND KISHORE v. ANWAR HUSAIN ... 91

**Concurrent lease—Rights of lessee—Assignment of Landlord's rights—Suit for rent against second lessee—maintainable—first lease not expired.**

The plaintiffs executed a lease of certain property in favour of R, and before the expiry of the term of that lease, another lease in favour of S who was authorised to recover the rent reserved under the previous lease from R. *Held*, that the latter lease was what is known as concurrent lease and operated as an assignment of the landlord's interest during the term of the earlier lease. As assignee of landlord's rights, S was entitled to collect rents from the previous lessee. *Harmer v. Beaon*. 3 C. and K., 307, applied.

RAM ANNANT SINGH v. SHANKAR SINGH ... 423

**Lease—(contd.)**

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*Suit to set aside lease.*

See N.-W. P. Rent Act, 1881, section 174 ... 472

See N.-W. P. Rent Act, 1881, section 174 ... 470

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*Power of lambardar to grant lease of co-parcenary land for seven years.*

See Lambardar ... 473

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**Lessor and Lessee—Suit for specific performance—Suit for possession of immoveable property—Limitation Act (XV of 1877), arts. 113, 144, sch. II.**

Where the lessors contracted to give possession to the lessees but did not do so, and the lessees brought a suit for possession, more than three years afterwards, *held*, that the suit was one for the specific performance of the contract and was governed by article 113, and not article 144, schedule II, Limitation Act, and the suit was barred by time.

CHARNA *v.* BANS LAL... 529**Legal Practitioners' Act (XVIII of 1879), section 9.**See Code of Criminal Procedure, section 4 (*v*) ... 40

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**section 13—compromise by client.**

A legal practitioner, who believing himself to be under a pecuniary liability to his client, endeavours to get the client to accept a less amount than that for which he is liable, is not guilty of "grossly improper conduct in the discharge of his professional duty" within the meaning of section 13 of the Legal Practitioners' Act.

In the matter of AHSAN ALI ... 127

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**section 15.**

See Code of Criminal Procedure, 1898, section 439 ... 749

**Limitation Act (XV of 1877), section 19—Acknowledgment—Natural guardian—Computation of limitation—Fresh start.**

*Held* BANERJI and RICHARDS, JJ., (STANLEY, C. J., dissenting)—that when a natural guardian acknowledges a debt, such acknowledgment is by an agent duly authorised in this behalf within the meaning of section 19 of the Limitation Act and gives a fresh start for the computation of limitation against the minor.

*Tilak Singh v. Chhutta Singh*, I. L. R., 26 All., 598, not followed. *Chinnaya v. Gurunathan*, I. L. R., 5 Mad., 169; *Sobhanair v. Srizammulu*, I. L. R., 17 Mad., 221; *Kailasa v. Ponnu*, I. L. R., 18 Mad., 456; *Subramania v. Arumuga*, I. L. R., 26 Mad., 330; *Annapagauda v. Sangadigayapa*, I. L. R., 26 Bom., 221; *Narendra v. Rai Charan*, I. L. R., 29 Cal., 647; *Beti Maharani v. Collector of Etawah*, I. L. R., 17 All., 192; *Kamula v. Har Sahai*, A. W. N., 1888, 187; *Chinnery v. Evans*, 11 H. L. C., 115, referred to.

*Held*, STANLEY, C. J., that the relation between a guardian and a ward is not that of an agent to a principal, but that of a trustee to a *cesti que trust*. A guardian is not competent to acknowledge a debt due from a minor so as to give a fresh start to the computation of limitation.

The difference between the manager of a Hindu family and a natural guardian of a minor pointed out.

RAM CHARAN DAS *v.* GYA PRASAD ... F. B. 375



**Limitation Act (XV of 1877)—(contd.)**

<b>section 22—objection as to non-joinder of party not taken at the earliest opportunity Code of Civil Procedure, 1882, section 34.</b>		
See Code of Civil Procedure, 1882, section 34	...	554
<b>schedule II, art. 75—instalment bond—creditor having option to sue for the whole on first default—option not exercised.</b>		
Under the terms of an instalment bond the creditor had an option to recover the whole amount but did not avail himself of it. On the contrary he brought this suit for recovery of an instalment more than three years after the date of the first default ; held that the suit was not barred by limitation.		
When a bond is not so worded as to compel a creditor to sue for the whole amount at once on the first default, he could not be compelled to sue for the whole. <i>Shankar Prasad v. Jaija Prasad</i> , I. L. R., 16 All., 371, applied.		
<i>AJUDHIA v. KUNJ LAL</i>	...	72
<b>art. 91—sham transaction—suit for declaration—no prayer for setting aside the deed—effect of—on suit.</b>		
When a plaintiff brings a suit for a declaration that a certain sale deed executed by him was a sham transaction, it is not necessary for him to sue to set it aside and article 91 of the Limitation Act has no application to such cases. <i>Shantilal v. Amarendro</i> , I. L. R., 23 Cal., 460, and <i>T. P. Petherpermal v. Muniandy</i> , 12 C. W. N., 562, followed.		
<i>JAGARDEO SINGH v. PHULJHARI</i>	...	421
<b>art. 91.</b>		
See Benami Transaction	...	290
<b>art. 97.</b>		
See Article 16	...	480, 484
<b>art. 105.</b>		
See Code of Civil Procedure, 1882, section 43	...	192
<b>art. 105.</b>		
See Code of Civil Procedure, 1882, section 43	...	278
<b>art. III.</b>		
See article 132	...	243
<b>art. 113.</b>		
See Lessor and Lessee	...	529
<b>art. 116, 97—Vendor and purchaser—Breach of covenant—Refund of consideration.</b>		
The defendant sold to the plaintiff half of a village, on 16th September, 1899. In respect of $\frac{1}{2}$ of that share one Nangi was recorded in possession in lieu of maintenance. The plaintiff purchased with knowledge of her rights and obtained a relinquishment from her. The courts, in spite of the relinquishment, refused to record the name of the plaintiff. The plaintiff brought a suit for possession against Nangi, but that suit was dismissed on 23rd November, 1900. The plaintiff brought the present suit for recovery of proportionate amount of sale consideration and damages on 9th July, 1904. Among other covenants there was one to the following effect : <i>Agar kisi wajah se mushtari ko kabza na mile to</i>		

**Limitation Act (XV of 1877)—(contd.)**

*woh nalissh karke kabza le le aur main zimmedar harja aur kharcha ka hounga.* Held, that that was a covenant for title and the defendant was liable to refund the proportionate amount of sale consideration. Held, further that the suit was for compensation for breach of covenant and the suit was not governed by article 97 but by article 116, Limitation Act, sched. II.

MUL KUNWAR *v.* CHATAR SINGH ... 480

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**arts. 116, 97—breach of covenant—dispossession of the vendee—return of sale consideration—registered sale-deed.**

A sale-deed set out that the property sold was unincumbered and there was a covenant that if the vendee was dispossessed from any portion of the property, the vendors would repay a proportionate part of the sale price. The vendee was dispossessed from a portion of the property by a prior incumbrancer. Held, that article 116 and not 97, sch. II., of the Limitation Act, governed the suit and the suit could be brought within 6 years from the date of dispossession. *Mul Kunwar v. Chatar Singh*, 5 A. L. J. R., 410, followed; *Tulshi Ram v. Murli Dhar*, I. L. R., 26 Bom., 750, referred to.

RAMJAGGI RAI *v.* KAULESHAR RAI ... 484

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**art. 116—covenant to deliver possession—possession not given—suit for money—compensation for breach of covenant.**

The defendants executed a bond hypothecating the mortgagee rights in certain property. There was a covenant that the mortgagee will be entitled to recover his money if possession was not delivered. More than three years after the execution, the mortgagee brought this suit for recovery of money. Held, that the suit, in effect, was a suit for compensation for breach of contract and was governed by article 116 of the Limitation Act. *Ram Narain v. Kamta Singh*, I. L. R., 26 All., 138, distinguished.

THE COLLECTOR OF MIRZAPORE *v.* DAWAN SINGH ... 486

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**art. 116.**

See Transfer of Property Act, 1882, sec. 90 ... 670

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**art. 120—declaration—cause of action—denial of title.**

Where the defendant's name was entered in the revenue papers in 1895, and the plaintiffs in 1903 applied for correction of those papers, when the defendant again asserted his title, held, the plaintiffs' cause of action for a declaratory suit arose in 1895, and there was no fresh cause of action in 1903 and the refusal to have the entry corrected was a continuation of the original cause of action.

Where the plaintiff is in possession and asks for a declaratory decree, the limitation applicable to the suit is that prescribed by art. 120, sch. II, Limitation Act, and should be computed from the date on which his cause of action arose. *Legge v. Ram Baran Singh*, I. L. R., 20 All., 35, F. B., followed. *Elahi Bukhsh v. Harnum Singh*, 18 A. W. N., 215; *Skinner v. Shanker Lal*, (unreported) distinguished.

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**Limitation Act (XV of 1877)—(contd.)**

**art. 132**—*unpaid vendor's lien—statutory charge—Transfer of Property Act (IV of 1882), section 55.*

A claim by a vendor for the enforcement of payment of purchase money by sale of the purchased property is a statutory charge differing from the lien which an unpaid vendor in equity possesses for the recovery of the balance of his purchase money. The article of Limitation applicable to such a suit is 132 and not 111. *Har Lal v. Muhamdi*, I. L. R., 21 All., 454; *Rama Krishna v. Subrahmania*, I. L. R., 29 Mad., 305, approved and followed.

MUNIR-UN-NISA *v.* AKBAR KHAN ... F. B. 243

**sch. II, art. 141**—*Muhamandan widow out of possession—suit within 12 years after her death.*

*G* died leaving a widow *B* and a brother *N*. *B* obtained possession in lieu of dower but shortly after lost it and her suit for possession was also dismissed. The defendants remained in possession for over 12 years. Within 12 years of *B*'s death but more than 12 years after her dispossession the heirs of *B* brought this suit for possession. *Held*, that the suit was barred by limitation. The suit would have been in time only if *B* had remained in possession till her death. *Hashmat Begam v. Mazhar Husain*, I. L. R., 10 All., 343; and *Azam v. Faizuddin*, I. L. R., 12 Cal., 504, referred to.

ALI AHMED *v.* MUHAMMAD OWAIS KHAN ... 715

**art. 144.**

See *Benami* transaction ... 390

**art. 144.**

See article 113 ... 529

**sch. II, art. 178**—*date of confirmation of sale—starting of limitation for execution.*

Section 316 of the Civil Procedure Code provides that the certificate of sale is to bear the date of the confirmation of sale and it must be deemed to have been granted on the date which it bears. Although the grant of a certificate is a necessary preliminary to an application under section 318, such an application will be barred by limitation under article 178 of the Limitation Act if not made within three years of the date which the certificate bears, that is the date of the confirmation of sale. Dissenting judgment of KEMBALL, J., in *Basapa v. Marya*, I. L. R., 3 Bom., 433, followed.

RANJIT SINGH *v.* BALDEO SINGH ... 516

**art. 178.**

See article 179 ... 403

**arts. 179, 178**—*execution of decree—decree as originally framed incapable of execution—amendment of decree.*

A decree for sale was obtained on foot of a mortgage. The decree was made absolute on 3rd February, 1903. By mistake of the Court or its officers, the decree ordered the sale of a village which did not in fact exist. The decree-holders applied for correction of the decree, and on 14th November, 1903, the correct name was substituted. Within three years from that date but upwards of three years from

**Limitation, Act (XV of 1877)—(contd.)**

that of the order absolute, the decree-holders applied for execution of the decree. *Held*, that the application was within time. A decree ordering sale of a non-existent village is incapable of execution, as it would be impossible to comply with the provisions of the law as to making and affixing proclamation on the property. *Muhammad Suleman Khan v. Muhammad Yar Khan*, I. L. R., 17 All., 39, relied upon.

BIHARI 72. RISAL ... 403

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**art. 179—Application in continuation of previous application.**

Certain property was attached in execution of a decree and was ordered to be sold. On the date fixed for sale the bidders did not come and the sale was not held. The decree-holder was required to pay certain fees for fresh sale notification. The court ordered that the case may be struck off "for the present." About two years after the date of sale and more than three years after the date of the application the decree-holder applied that the property which could not be sold for want of bidders may be sold. *Held* that the application was an application in continuation of the previous application and the decree was not barred by limitation, by using the words 'for the present' the court intended to keep the execution proceedings in abeyance.' *Dhaki Ram v. Jogendra*, 5 C. W. N., 347, distinguished. *Rahim Khan v. Phul Chand*, I. L. R., 18 All., 482, referred to.

*Held* further that having regard to rule 388 of the rules of 4th April, 1898, no fee should have been levied for further sale notification.

MUJIB-ULLAH v. UMED BIBI ... 610

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**art. 179—Application for sale of other property also dismissed—Third application to sell the property the sale of which was asked for in the first application—Whether could be treated as in continuation.**

Decree-holder obtained a decree for sale of several properties against the representatives of I. He put the decree in execution on the 7th August, 1900, against the village B which had come on partition between the heirs of I to S and which was mentioned in the order absolute as liable to be sold. S objected on the ground that she had paid the proportionate share of the decretal amount. The application was dismissed. Thereupon, on the 20th January, 1902, the decree-holder applied for sale of another village in possession of the other set of heirs of I. They objected and their property was released on the ground that the village B ought to be sold first. The decree-holder applied for sale of B on 9th February, 1907. *Held* that the execution of the decree was barred by limitation and the decree-holder could not get the benefit of intervening proceedings against the second set of P's heirs. The application could not be treated as an application in continuation of the application to sell the other village in possession of the second set of heirs as S had no interest in that. Further it could not be treated as an application made in continuation of the application of 1900 as that application had been dismissed. *Thakur Prasad v. Abdul Hasan*, I. L. R., 23 All., 13, referred to.

SAFIA BEGUM 72. SHIAM PRASAD ... 622

**Limitation Act (XV of 1877)—(contd.)**


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**art. 179—Decree in appeal—Limitation runs from date of.**

When an appeal is entertained and an order is made by the court to which the appeal is preferred, which has the effect of finally disposing of the appeal, time for execution runs from the date of the order of the appellate court.

Where an appeal was not pressed before an appellate court and was dismissed, *held* that the time began to run from the date of the decree in appeal.

*Jeeyangar v. Lakshmi Bai*, 16 M. L. J., 393, followed.  
*Hingan Khan v. Ganga Parshad*, 1. L. R., 1 All, 393. *Fazl Husen v. Raj Bahadur*, 1. L. R., 20 All., 124, distinguished.

FAZAL-UR-RAHMAN *v.* SHAH MUHAMMAD KHAN ... 580

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**art. 179 (4)—Process fee—payment without application to issue proclamation—Freshstart—Step in aid of execution**

An application for attachment was resisted by certain persons whose objections were dismissed. The suit brought by them was decreed on appeal by the District Judge. While the second appeal by the decree-holders was pending in the High Court, the decree-holders made an application for the arrest of the judgment-debtors. This application was made more than three years after the application for attachment, but within three years of the payment of process fees on that application. While paying the process fees, no application was made to issue a sale proclamation. *Held*, that the mere payment of process fee was not a step in aid of execution and did not give a fresh starting point to limitation. *Thakur Ram v. Katwaru Ram*, 1. L. R., 22 All., 358, referred to. *Vijayaraghavalu v. Srinivasalu*, 1. L. R., 28 Mad., 399, distinguished.

When attachment is issued on an application for execution and objections are preferred by an objector, the application for attachment and sale remains in suspense until the application and the suit, if any, brought by the objector is decided, after which the decree-holder may proceed with his application.

SHEO PRASAD *v.* INDAR BAHADUR SINGH ... 258

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**art. 179, clause 5—Decree—execution—application for execution—Code of Civil Procedure (Act XIV of 1882), section 248—Notice—date of the order.**

The date of issuing a notice under section 248 of the Civil Procedure Code is the date on which the court orders the issue of notice and not the date on which the notice is actually issued. The limitation therefore under article 179, clause 5, of the second schedule to the Limitation Act (XV of 1877) runs from the former date.

JUMAI KANJAR *v.* ABDUL KARIM KHAN ... 524

**Lis pendens.**

See Transfer of Property Act, 1882, section 52 ... 477

**Lord's Day Act—Application of, to India.**

See Practice ... 106

**Mandatory injunction—Joint property building by one co-sharer without the consent of others—no direct loss—**

See joint property ... 39

**Malicious prosecution**—*damages, suit for—action taken by police—prosecutor—charge false to the knowledge of complainant.*

Where a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, he cannot be held responsible in damages for the failure of prosecution. But if the charge is false to the knowledge of the complainant and he misleads the police by bringing suborned witnesses or influences them to assist him in sending an innocent man to trial, he would be liable, although the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—who was the prosecutor? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. *Fitz John v. Mackinder*, 9 C. B. N. S., 505; *Narsinga Row v. Muthaya Pillai*, I. L. R., 26 Mad., 362, referred to.

GAYA PRASAD TEWARI *v.* BHAGAT SINGH ... P. C. 665

**Marriage**—*presumption—arising from co-habitation—habit and repute.*

Before applying the general presumption of marriage arising from co-habitation with habit and repute, it is necessary to make sure that the conditions necessary for its existence are present. Held that where a Burmese woman lived with a Burman, who had a wife and mistresses, and cohabited with him, there was no presumption that she was his wife.

Before repute can arise there must be some body of neighbours, many or few or some sort of public, large or small. The habit and repute, which alone is effective, is habit and repute of that particular status which in the country in question is lawful marriage.

MA WUN DI *v.* MA KIN ... P. C. 63

**Mesne profits**—*alienation by widow—invalidity of the alienation—Right of the reversioners to recover mesne profits.*

Held also that the claim for mesne profits was well founded the defendants having been in possession of the property under deeds of sale which were not good as such.

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU ... P. C. 184

**Minor**—*False and fraudulent representation by—effect of—*

See Estoppel ... 674

—*grant of letters of administration when to be made to.*

See Probate and Administration Act, 1881, section 33 ... 736

**Mortgage**—*adverse possession—mortgagor dispossessing mortgagee—rights of the mortgagor.*

See Possession—adverse possession ... 85

—*assignment of fictitious mortgage—Subsequent mortgage for consideration—rights of the assignee as against mortgagor and mortgagee.*

See Transfer of Property Act, 1883, section 53 ... 305

**Mortgage—(contd.)**

—————*notice—unregistered deed—sale of the property hypothecated—Purchaser having notice of the mortgage—Property pre-empted by the defendant—whether notice to pre-emptor.*

A right of pre-emption is not a right of re-purchase but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derives his title. He can only get what the vendee bargained for.

Where, therefore, a vendee purchases with notice of a prior unregistered encumbrance and the property is pre-empted, the pre-emptor takes subject to that mortgage even if the existence of that mortgage was concealed from him.

TEJPAL v. GIRDHARI LAL ... .. 112

—————*notice—sale of property subject to an unregistered mortgage—notice of mortgage severed after execution of sale-deed, but before registration.*

See Indian Registration Act, section 47 ... .. 607

—————*redemption—foreclosure suit against a Hindu father—Sons not made parties—creditor having knowledge of their existence—Son's suit to redeem—maintainability of.*

The principle of the ruling in *Debi Singh v. Jia Ram*, I. L. R., 25 All., 214, should not be extended to the cases where a mortgagee having knowledge of the existence of the sons of the mortgagor does not implead them in a suit for foreclosure and obtains a decree against the father alone. The sons, who were not made parties to the foreclosure suit, can maintain an action to redeem the property on the sole ground that they were not made parties to the suit. *Bhawani Prasad v. Kallu*, I. L. R., 17 All., 537, referred to.

RAM PRASAD v. MAN MOHAN ... .. 267

—————*Redemption—fixed rate tenancy—mortgagor dying childless.*

See Transfer of Property Act, 1882, section 91 ... .. 579

—————*Redemption—sale—prior mortgages—Court-fees.*

See Court Fees Act (VII of 1870), section 7, clause 1 ... .. 18

—————*Redemption—surplus profits.*

See Code of Civil Procedure, 1882, section 43 ... .. 192

—————*Redemption—by reversioners during the life-time of the widow.*

See Transfer of Property Act, 1882, section 91 (c) ... .. 631

—————*Sub-mortgagee—Right to sell mortgaged property—Frame of suit.*

In a properly constituted suit a sub-mortgagee is entitled to a decree for the sale of the mortgaged property. The mortgagor in such a suit must be impleaded as also the mortgagees, so that the former may have an opportunity of redeeming and the latter may be able to safe-guard their interests in regard to the claim put forward by the sub-mortgagee, and see that the amount claimed is due.

AHMAD ALI KHAN v. BILAS RAI... .. 402

**Mortgage—(concl'd.)**

— *right of an executor also a residuary legatee to mortgage—suit by pecuniary legatee to set it aside will—unpaid legacy charge—priority—lapse of time—presumption—minority of legatees—notice.*

In a suit to establish the priority of a charge in respect of an unpaid legacy over property of which an equitable mortgage was made, the mortgagors being residuary legatees as well as executors, and the mortgagees not being shown to have made any investigation of the title, *held*, that the claim must prevail over the mortgage.

A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any, therefore the mortgagee would be safe as against creditors.

*Graham v. Drummond*, L. R., [1896] 1 Ch., 968, 974, distinguished.

*In re Quale's Estate*, 17 L. R., (Ir.), 361, referred to.

Where the mortgage was executed long after the time when by the terms of the will the legacy was to be made up and paid, but the legacy had remained unsatisfied, lapse of time was, no doubt, a circumstance to be considered as implying the consent of the legatee to the executor's act, but the minority of two of the legatees at the time of the mortgage and the continued possession of the mortgagors rendered that principle inapplicable.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI ... P. C. 661

**Muhammadan Law—Dower-debt.**

See Succession Certificate Act, 1889 ... 598

— *Gift—Mushaa of undivided property—possession of half.*

G made a gift of his property to his two daughters and delivered possession of a half undivided share to one of them, the other being absent on a pilgrimage. *Held*, that the gift was not invalid but passed the interest in the property to the daughters. *Muhammad Mumtaz Ahmad v. Zubaidajan*, I. L. R., 11 All., 460, referred to.

MOHIB-UL-LAH *v.* ABDUL KHALIK ... 566

— *Guardianship—Mother—transfer by—Lunatic's benefit—Setting aside of transaction.*

When a Muhammadan mother acting as a *de facto* guardian of her son who is a lunatic, deals with his property on his behalf and for his benefit, the transaction should not be set aside, although under the Muhammadan Law she cannot be his guardian. *Mafazzul Hussain v. Rashid*, I. L. R., 34 Cal., 36; *Ramcharan v. Anukulchandra*, I. L. R., 34 Cal., 65; *Majidan v. Ram Narain*, I. L. R., 26 All., 22; referred to.

UMMI BEGUM *v.* KESHO DAS ... 470

— *Inheritance—Tenancy.*

See Agra Tenancy Act, section 22 ... 77



**Muhammadian Law—(concl'd.)**

*Inheritance—Shia School—Maternal uncle—father's cousin—preference between.*

According to the Shia School of Muhammadian Law a cousin of the deceased's father has no right of inheritance if a maternal uncle of the deceased exists, the general rule being that one who is related to the deceased in a near degree excludes the one who is more remote.

NIJABAT ALI *v.* WAZIR ALI ... 543

*Pre-emption—Shafi khaleet—Partner in the immunities or appendages—Nature of right—Common servient tenement between property of vendee and property in dispute.*

Plaintiff pre-emptor and defendant No. 2, vendor, were brothers. Defendant vendor sold to defendant No. 1, a neighbour, two houses adjacent to each other, and between the female apartments of which and the house of the plaintiff, there was a passage for the use of the inmates. Plaintiff sued for pre-emption as neighbour and *shafi khaleet*. The defence was that the plaintiff had no right of pre-emption in preference to that of the vendee who was a neighbour and also a *shafi khaleet*, inasmuch as the water from the privy of his house passed through the land of a third person over which land the water from the roof and *Parnalas* of the houses in dispute also fell.

*Held*, that under the Muhammadian law, the right of the defendant vendee over the land of the third person was a totally different right from that of the defendant vendor over the same land. The defendant vendee was not a participator in any sense either in the property sold or in any of its immunities or appendages.

MUSHARRAF ALI *v.* SHAUKAT ALI ... 509

*Application of, pre-emption based on custom—death of the pre-emptor.*

See Pre-emption ... 752

*Will—Shia School—Bequest to one heir to the exclusion of others—more than one-third of the estate.*

A Muhammadian testator, governed by the Shia School of law, cannot make a valid bequest of all his property to one of his heirs to the exclusion of the other heirs, unless the heirs so excluded consent to it subsequent to his death. But the bequest of one-third of the estate will be valid, if made to one of the heirs, without the consent of the other heirs. *Cherachom v. Valia Pudiakel*, 2 Mad., H. C., 350; *Keramatul v. Nassan*, 2 Morley's Digest, 120.

FAHMIDA KHANAM *v.* JAFRI KHANAM ... 169

**Mukaddami rights—**

See Hindu Law—alienation—widow ... 590

**Mukhtiar—right to practice in Criminal Courts.**

See Code of Criminal Procedure, section (4) (v) ... 40

**Multifariousness—Suit for possession of property within and outside jurisdiction of court, compromised—relief for property within jurisdiction—effect of—cause of action—jurisdiction once vested in court—Act of parties—effect of, on.**

*K* filed at Bareilly a suit for possession of her share in her father's property situate in Bareilly and Bara Banki, against

**Multifariousness—(contd.)**

her brother and his transferees. There were different transferees of the properties situate in the two districts. The claim about Bareilly property was compromised. *Held*, that there was a single cause of action against the brother and his transferees, namely, the infringement of the plaintiff's right by her brother, out of which the claims of the other defendants arose, and the suit was not bad for multifariousness. *Indar Kuar v. Gur Prasad*, I. L. R., 11 All., 33; *Mazhar Ali v. Sajjad Husain*, I. L. R., 24 All., 358; *Parbati Kunwar v. Mahmud Fatima*, I. L. R., 29 All., 267; *Ishan Chander v. Rameswar Mondol*, I. L. R., 24 Cal., 831; *Nando Kunwar v. Banomali*, I. L. R., 29 Cal., 871; referred to. *Ram Raji v. Dhup Navain*, [1885] A. W. N., 125, over-ruled. *Ganeshi Lal v. Khairati Singh*, I. L. R., 16 All., 279, distinguished.

When once jurisdiction is vested in a court, it will not be taken away by any act of parties. Hence the compromise of the suit about Bareilly property did not take away the jurisdiction of the Bareilly court to adjudicate about Bara Banki property. *Khatija v. Ismail*, I. L. R., 12 Mad., 380, referred to.

KUBRA JAN *v.* RAM BALI .. ... F. B. 647

**Municipalities Act (No. 1 of 1900-U. P.)—section 88—public street—meaning of—blind lane.**

Where it was proved that a *cul de sac* had been lighted, drained, and swept by the Municipality, and upon sale of the property of the former owner, the portion forming this lane had not been sold, and the public had been using it freely for thirty years, *held* that it was a public street within the meaning of section 88, sub-section 1, of the North-Western Provinces and Oudh Municipalities Act. Where, therefore, the municipality ordered the demolition of constructions made upon it, and an injunction was asked for against interference with the lane, *held*, that the municipality acted within its rights and the injunction should not be granted.

THE MUNICIPAL BOARD OF BULANDSHAHR *v.* DAKHHAN LAL .. ... 45

**Notice—See Mortgage.**

See Indian Registration Act, 1877, section 47... 607

——— *Will—unpaid legacy—charge—mortgage—priority—lapse of time—presumption—*

See Mortgage .. ... 661

**N.-W. P. Rent Act (XII of 1881), section 174—Lease by Collector—Proceedings commenced before the passing of Act II of 1901—termination of.**

In executing a decree of a Rent Court, the Collector, purporting to act under section 174 of the N.-W. P. Rent Act, made a lease of the property of the judgment-debtor, after the passing of the Tenancy Act II of 1901. In a suit brought to set aside the lease, *held* that the execution proceedings having commenced before the passing of the new Act should have been completed under that Act and the Collector could grant a lease of the property instead of selling it.

GHULAM ABBAS *v.* ABDULLA KHAN .. ... 472

**Nuisance—killing of cows.**

See Code of Civil Procedure, 1882 .. ... 147

<b>Official assignee</b> — <i>representative of the judgment-debtor—Code of Civil Procedure, 1882, section 244.</i>	
See Code of Civil Procedure, 1882, section 244	... 553
<b>Onus probandi</b> — <i>adoption—onus of proving invalidity.</i>	
See Hindu Law—adoption	... 200
————— <i>alienation—Hindu widow—Legal necessity.</i>	
See Hindu Law—alienation	... 184
————— <i>Hindu Law—debts—son's liability—immorality—Antecedent debts.</i>	
See Hindu Law—debts	... 175
————— <i>Suit under section 583 of the Code of Civil Procedure, 1882.</i>	
See Code of Civil Procedure, 1882, section 283	... 358
<b>Pardon</b> — <i>forfeiture of admissability of the statement of approver on oath—irregularity intending pardon.</i>	
See Code of Criminal Procedure, 1898, section 337	... 691
<b>Parties</b> — <i>adding of—adverse claimants.</i>	
See Transfer of Property Act, 1882, section 85	... 604
————— <i>suit for possession of trust property.</i>	
See Trust	... 243
————— <i>Sub-mortgage—suit upon.</i>	
See Mortgage—sub-mortgage	... 402
<b>Partition</b> — <i>Agreement among co-owners that shares should remain joint—not enforceable.</i>	
See Hindu Law—Partition	... 670
————— <i>Land assessed to Revenue—Jurisdiction of Civil and Revenue Courts.</i>	
See Jurisdiction—Civil and Revenue Courts	... 725
<b>Partition Act (IV of 1893), section 4</b> — <i>“undivided family”, meaning of—whether applicable to Muhammadans.</i>	
Muhammadans are not excluded from the benefit of section 4 of the Partition Act (IV of 1893). The object of that section explained. <i>Pershad v. Bankey Lal</i> , 9, Oudh cases 153, followed. <i>Haskmat Ali v. Muhammad Umar</i> , I. L. R., 29 All., 308, over-ruled.	
SULTAN BEGUM <i>v.</i> DEBI PRASAD	... F. B. 352
<b>Penal Code (Act XLV of 1860), section 338</b> — <i>Operation for contract—failure of operation—negligence.</i>	
When an accused in good faith performed an operation upon a woman with her consent for cataract according to the recognised method of Indian eye surgery, the result of which was that she lost her eyesight, <i>held</i> that he was not guilty of an offence under section 338 of the Indian Penal Code.	
SURAJBALI <i>v.</i> EMPEROR	... 155
————— <b>section 415.</b>	
See Code of Criminal Procedure, 1898, section 179	... 333
————— <b>section 430</b> — <i>mischief—Canal Act (VIII of 1873), section 70.</i>	
When the accused cut the <i>patri</i> on the borders of the canal distributory and through the gap thus made turned off the water from the distributory to their fields, they were not guilty of committing mischief but were guilty of an offence under the Canal Act.	
TAJ-UD-DIN <i>v.</i> EMPEROR	... 159

**Possession**—*Adverse possession*—*Mortgagor dispossessing Mortgagee*—*proprietary rights not acquired*—*Mortgagees' rights*—*rights of co-mortgagor.*

By adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. Where, therefore, one, of the two mortgagors dispossesses a usufructuary mortgagee at a time when the mortgagors were not entitled to immediate possession and remains in possession for a period of twelve years, he does not acquire full proprietary rights. He only acquires the mortgagee's rights, which are rights of a limited nature, and only these rights vest in him. *Muhammad Husain v. Mulchand*, 1. L. R., 27 All., 395; *Chinto v. Janki*, 1. L. R., 18 Bom., 51; *Bejoy Chandra v. Kally Prosunno*, 1. L. R., 3 Cal., 327, referred to.

When a mortgagor acquires such a possession against the mortgagee, his co-mortgagor can recover possession of his share only by redeeming him. *Vilhoba v. Ganga Ram*, 12 Bom., H. C., 180, referred to.

ISMDAR KHAN *v.* AHMAD HUSAIN ... 85

—*One co-sharer—joint property—whether adverse possession.*

Exclusive possession of a co-owner of property which originally had been joint, does not *per se* amount to adverse possession as against his co-sharers. Where one of the two sisters remained in possession of the father's property for twenty-one years and the other did not "participate in possession," *held*, that that only did not make her possession adverse. *Sheikh Asud Ali v. Sheikh Akbar Ali*, 1 C. L. R., 364; *Baroda Sundari v. Annoda Sundari*, 3 C. W. N., 774, referred to.

PARBATI *v.* RAM PRASAD ... 511

**Practice**—*Full Bench reference*—*Bench not constituted*—*Powers and duties of the Division Bench.*

See Code of Civil Procedure, 1882, section 244 ... 283

—*First Court stopping plaintiff's evidence*—*Appellate Court, procedure of*—*When it thinks evidence insufficient*—*Remand.*

A Munsif treating a case as undefended, stopped the plaintiff from producing all the available evidence. The Judge in appeal treating the evidence as insufficient dismissed the suit. *Held*, that the proper course was to remand the case to the first court, in order that it may give the plaintiff an opportunity of producing his evidence. *Kalian Prasad v. Bishnath*, A. W. N., 1905, p. 266, followed.

PABITRA KUNWAR *v.* MAHARAJA OF BENARES ... 468

—*Proceedings on Sunday—whether void*—*Lord's Day Act*—*application to India.*

A Munsif went on an inspection on Sunday. While there the parties entered into a compromise which was recorded by him and a decree passed on the spot. *Held* that the proceedings of the Munsif were not vitiated by the fact that they were taken on a Sunday. Lord's Day Act does not apply to India. *Paramshook v. Rasheed-ud-dowlah*, 7 Mad., H. C. R., 285, referred to.

SHEORAM TEWARI *v.* THAKURPRASAD ... 106

**Practice—(contd.)**

—————*order of Remand—appeal from—after decree in suit.*

See Code of Civil Procedure, 1882, section 568 ... 447

**Primogeniture—Law of—**

See Hindu Law—Impartable estate ... 425

**Pre-emption—nature of the right of—effect if pre-emption allowed.**

See Mortgage ... 112

—————*Wajib-ul-arz—Sale on 'same price as paid by stranger'—No right inter se among different classes of pre-emptors.*

Where a *wajib-ul-arz* recognised a right of pre-emption 'on the same price as paid by a stranger' (*shakhs ghair*), though it mentioned different categories of pre-emptors, and gave some of them a preferential right over others, *held*, that the right to pre-empt arose only in the case of a sale to a stranger. *Khatun Bibi v. Sayida Bibi*, 1. L. R., 27 All., 456, referred to.

NARAIN SARAN SINGH *v.* SIDH NARAIN SINGH ... 655

—————*Wajib-ul-arz—Construction—Rights of holders of khalsa and milk.*

The *wajib-ul-arz* of a village provided as follows :—The zamindar of the *khalsa* is one person, hence there is no custom of pre-emption in the *khalsa* but among the owners of the *khalsa* and the *milk* the following custom of pre-emption prevails. *Held*, that under the condition of the *wajib-ul-arz* set out above, the *khalsa* land was not subject to a claim of pre-emption but that the Muhammadan Law of pre-emption applied, and the fact that the property was purchased by a Hindu made no difference. *Gobind Dayal v. Inayat-ullah*, 1. L. R., 7 All., 775; *Qurban Husain v. Chote Lal*, 1. L. R., 22 All., 102; *Amir Hasan v. Rahim Baksh*, 1. L. R., 19 All., 466, referred to.

RAMLAL *v.* BAHADUR ALI ... 414

—————*Wajib-ul-arz—Arasidar—Hissedar.*

*Arasidars* in District Basti are not members of the coparcenary body in a village. A custom of pre-emption, recorded in a *wajib-ul-arz*, in respect of the transfer of a *haqiat* by a *hissedar* applies only to co-parceners, and no claim can be maintained in respect of the sale of *arazidari* land.

UMAN KUAR *v.* JARBANDHAN PATTHAK ... F. B. 447

—————*Wajib-ul-arz—Construction—Hindu Widow's brother—not entitled to pre-empt—purchaser—stopped from denying the sale.*

A *wajib-ul-arz* of a village gave a right of pre-emption to the brother of the vendor and then to co-sharers. Further on it provided that a Hindu widow, succeeding to her husband, would have no right to sell to her brother or father. *Held*, that the *wajib-ul-arz* must be read as a whole, and the brother of a Hindu widow had no right to pre-empt and could not resist a claim by a co-sharer for pre-emption.

It does not lie in the mouth of the person purchasing the property, in violation of the terms of the *wajib-ul-arz*, to say that there has been no sale.

RAM NIWAZ *v.* DAKHO ... 182

**Pre-emption—(contd.)**

————— **Wajib-ul-arz—Sharik-hakiat—Malik—Owner of resumed muafi—Preference over co-sharers in other khata.**

The *wajib-ul-arz* gave a right of pre-emption to *sharik hakiat*, if any, of the *malikans* who sold their property. *Held*, that an owner of resumed *muafi* (where that was resumed before the preparation of the *wajib-ul-arz*), was a *malik* within the meaning of the *wajib-ul-arz*, if he was a co-sharer in the same *khata* with the vendor and had a preferential right over a *sharik* of a different *khata*.

NARAIN PRASAD *v.* MUNNA LAL... 302

————— **Wajib-ul-arz—construction—Shurkayan-i-shikmi—meaning of.**

Where the *wajib-ul-arz* of a village gave a right of pre-emption first to *shurkayan-i-shikmi*, then to *shurkayan-ek-jaddi* and lastly to *khewatdaran*, *held* that *shurkayan-i-shikmi* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal. *Jeymal v. Kesree*, [1866], Agra Full Bench Rulings, 171, referred to. *Abdul Shakur v. Mendai*, [1901] I. L. R., 23 All., 260, distinguished.

BAHAL SINGH *v.* MUBARAK-UN-NISSA ... 52

————— **Wajib-ul-arz—construction of—Custom or contract—Partition—Co-sharer.**

Where a *wajib-ul-arz* opened with a declaration that the zamindars and *khewatdars* agreed that up to the term of settlement and in future to the termination of the next settlement they should abide by the following conditions and act upon them, and one of the conditions related to pre-emption, *held* that the record was one of contract and not custom.

Where a *wajib-ul-arz* recognised a right of pre-emption in favour of co-sharers descended from a common ancestor, and by reason of a subsequent partition, the pre-emptor, though descended from the same stock as the vendor, had ceased to hold any share in the *mahal*, portion of which was the subject of sale, *semble* if the right recorded was one existing by custom, the plaintiff would be entitled to pre-empt.

BUDH SINGH *v.* GOPAL RAI ... 539

————— **Wajib-ul-arz—Custom or contract—Construction.**

A *wajib-ul-arz* provided that "no pre-emption suit has as yet been brought or decided. We agree that the custom of right of pre-emption should prevail in future (*aendu jari rakhna manzur hai*).” In the *wajib-ul-arz* prepared at the subsequent settlement, no such clause was inserted. *Held*, that the record was a record of contract and not a record of pre-existing custom and came to an end with the subsequent settlement. *Sewak Singh v. Girja Pande*, 2 A. L. J. R., 6, distinguished.

TASADUK HUSAIN KHAN *v.* ALI HUSAIN KHAN ... 470

————— **Wajib-ul-arz—One mahal—Perfect partition—Custom—Contract.**

Mauza Barauli was sub-divided by perfect partition into three mahals : Mahal Ali Mazhar, Mahal Bhairon Pershad, Mahal Sheo Dial Ram. Before partition the *wajib-ul-arz* of the Mauza provided that a right of pre-emption existed in the following order : first to sharers descended from a common ancestor, then to co-sharers in the village, then to strangers. At the time of partition three *wajib-ul-arzes* were

**Pre-emption—(contd)**

prepared for the three mahals. The *wajib-ul-arz* for the mahals Ali Mazhar and Bhairon Pershad, which mahals had a sole proprietor, reproduced the wording of the *wajib-ul-arz* of the undivided village, in a chapter, the heading of which referred to the rights of sharers in the mahal. In the third mahal, which had numerous sharers, the wording of the original *wajib-ul-arz* was modified, and it was provided that a right of pre-emption in case of a transfer by a *pattidar* would exist in the following order : first co-sharers descended from a common ancestor, then pattidars, then strangers. On sale of Mahal Ali Mazhar the proprietor of Mahal Bhairon Pershad sued for pre-emption, basing his claim on the *wajib-ul-arz*. Held that the preparation of new *wajib-ul-arzes* for the three mahals abrogated the old custom of pre-emption, and that the fact that the sole proprietors of Mahals Ali Mazhar and Bhairon Pershad had caused to be made an entry in the *wajib-ul-arz* relating to the right of pre-emption in those mahals, did not give these proprietors any authority to control their own rights or the rights of their successors over the property. The *wajib-ul-arz* did not prove the existence of a custom of pre-emption in the mahals in question.

B. E. O'CONOR *v.* RAJ BAHADUR... 79

——— *refusal to purchase—before sale settled with a stranger—effect of.*

In order to defeat the plaintiff's right of pre-emption, it must be shown that an offer to purchase was made to him when the price had been fixed between the vendor and the vendee and that was brought to his knowledge. The mere fact that the plaintiff refused to purchase before the price was settled between the vendor and vendee, does not debar him from claiming his right of pre-emption. *Kanhia Lal v. Katka Prasad*, I. L. R., 27 All., 670 ; *Sohan Lal v. Shahab-uddin*, S. A. 909 of 1901, followed.

MUNAWAR HUSAIN *v.* KHADIM ALI... 331

——— *Final decree—Date fixed for preferring an appeal not expiring.*

A decree does not become final before the date allowed for preferring an appeal expires. *Sheikh Ewas v. Mokuna Bibi*, I. L. R., 1 All., 132, and *Ram Sahai v. Gaya*, I. L. R., 7 All., 107, followed.

GOPAL DAS *v.* MAMMAN KUAR... 136

——— *Plaintiff dead—Representatives can carry on suit based on custom—Rule of Muhammadan Law—Pre-emptor's right—subsisting on date of decree—Second purchase by vendee—No suit for pre-emption—Vendee's title absolute—Burden of proof.*

The representative of the pre-emptor in a suit based upon the *wajib-ul-arz* is a co-sharer and can carry on the suit which his predecessor in title instituted. The principle of Muhammadan Law does not apply to a case of pre-emption based on custom.

A plaintiff claiming pre-emption is not entitled to a decree unless his right subsists upon the date of the decree. Where the vendees purchase a second share in the property and no suit for pre-emption is brought in respect of that share within one year, they are entitled to retain the share

**Pre-emption—(contd.)**

formerly purchased and in respect of which a suit for pre-emption had been instituted.

It is for the plaintiff pre-emptor to show that a suit for pre-emption in respect of the second purchase had been instituted.

MALKHAN SINGH *v.* KASHI PRASAD ... 752

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*Leave to sue next friend of a minor.*

See Code of Civil Procedure, 1882, section 440 ... 633

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*against partial intestacy.*

See Will—construction of— ... 519

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*Will—unpaid legacy—lapse of time.*

**Principal and Agent—Ratification.**

See Contract—Principal and Agent ... 184

**Principal and surety—admission of Principal debtors.**

See Contract—Principal and surety ... 142

**Probate and Administration Act (V of 1881), section 33—Minors—Right to be appointed administrators.**

Section 33 of the Probate and Administration Act does not warrant Letters of Administration being granted to minors under the guardianship of any one. Only in cases where minors are solely entitled to the estate according to the rules for distribution of the intestate's estate can Letters of Administration be granted to persons to whom the minors' estate has been committed by competent authority.

JAIHAL SINGH *v.* HARI SINGH ... 736

**Provincial Small Cause Courts Act (IX of 1887), section 25—**

*Revision—Powers of High Court—Code of Civil Procedure (Act XIV of 1882), sections 108, 622—Setting aside ex parte decree—Condition precedent.*

The powers of revision given to the High Court by section 25, Small Cause Court Act, are more extensive than those exercised by that Court under section 622, Civil Procedure Code. *Maclaren v. Welti*, [1907] A. W. N., p. 227; *Vias Ram v. Kalla Ram*, I. L. R., 21 All., 89, referred to.

The deposition of the decretal amount or the furnishing of the security is a condition precedent to the setting aside of an *ex parte* decree. Where none of these essentials has been complied with, the court is bound to dismiss the application. The defect is not cured by subsequently depositing the decretal amount. *Jagannath v. Chel Ram*, 3 A. L. J. R., 318, followed.

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**section 35—**

See Code of Civil Procedure, 1882, section 223 ... 42

**Ratification—Principal and Agent.**

See Contract—Principal and Agent. ... 184

**Redemption—Mortgage.**

See Code of Civil Procedure, 1882, section 43 ... 192

See Mortgage—Redemption.



**Registration Act, 1877, section 17, clause (b),**

See Evidence Act, 1872, section 92 ... 717

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**sections 47, 50**—*Sale of property subject to an unregistered mortgage—Notice of mortgage served after execution of sale-deed but before registration—purchaser whether bound.*

Where property is sold which had a previous unregistered mortgage existing in respect of it, the registration of the mortgage not being compulsory, and notice of the mortgage is served on the vendee after the sale-deed is executed but before it is registered, the purchaser is bound by the mortgage. *Diwan Singh v. Jadhoo Singh*, 1. L. R., 19 All., 145, and *Bhikki Rai v. Udit Narain Singh*, 1. L. R., 25 All., 366, applied.

KHIALI RAM ? HIMMATA ... 607

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**section 50.**

See Section 47 ... 607

**Religious endowment**—*Power of a Hindu testator to place limitations—Request followed by endowment.*

See Hindu Law—Religious endowment ... 256

**Religious Endowment Act (XX of 1863), section 14**—*Power to appoint a new trustee—Code of Civil Procedure (Act XIV of 1882), section 539.*

Section 14 of the Religious Endowment Act only empowers a court to direct the specific performance of any act by the trustee, manager or superintendent or to award damages or costs against such trustee, manager or superintendent and to direct their removal. It confers no power on the court to appoint a new trustee, manager or superintendent, for which the proceedings provided for by section 539 of the Code of Civil Procedure must be resorted to.

SADA SHANKAR ? HARI SHANKAR ... 191

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—*payment of in advance—**subsequent sale*

See Lease ... 91

**Rent free holding**—*Suit for partition.*

See Jurisdiction—Civil and Revenue Courts ... 734

**Residency Legatee**—*Right of mortgage for personal debts where there are unpaid legatees.*

See Mortgage ... 661

**Res judicata**—*Co-defendants.*

The plaintiffs brought the suit for possession against the defendant, alleging that the mortgage which he held had been satisfied by the usufruct. The plaintiffs and the defendants were co-defendants to a suit for redemption which had been brought by a third party who represented only a portion of the equity of redemption. The plaintiffs who were defendants to that suit did not defend it, although they might have then pleaded that the plaintiff to that suit was not entitled to the whole of the equity of redemption, and that they had also an interest in it as reversioners. In their present suit the plaintiffs claimed possession of a portion of the property setting up their right to it as reversioners. *Held*, that their present suit was not barred by *res judicata*, although they might have pleaded their title as owner of a portion of the equity of redemption.

KALLU ? FAIZ ALI KHAN ... 367

**Res-judicata**—(contd.)

————— *Land Revenue Act (III of 1901)—Section 36—Application for fixing the rent—Certain bond held as obtained by undue influence—Subsequent suit—Whether finding res judicata.*

The zamindar obtained a bond from a tenant in payment of rent at a certain rate for non-occupancy and ex-proprietary holding. The tenant applied to the revenue court, under section 36 of the Land Revenue Act, to fix the rent of the holdings. The Assistant Collector held that the bond was obtained by undue influence so far as it related to the ex-proprietary holding and fixed the rent of that holding. In a suit brought by the zamindar for arrears of rent, *held*, that the finding of the Assistant Collector about the bond having been obtained by undue influence did not operate as *res judicata* inasmuch as it was not open to him in an application under section 36, Land Revenue Act, to decide that the agreement was void so as to preclude the plaintiff from setting it up in a suit.

SHOHRAT SINGH *v.* SONKALA KUARI ... 642

————— *Landlord and tenant—ejectment—revenue court.*

See Jurisdiction—civil and revenue courts ... 30

————— *Question of title decided on former suit by revenue court—former suit wrongly instituted in that court—Appeal to the civil court—suit to be deemed as instituted in right court.*

Code of Civil Procedure, 1882, section 13 ... 407

See Code of Civil Procedure, section 13 ... 48

See Code of Civil Procedure, 1882, section 13... 47

**Reversioners**—*Widow—Alienation.*

See Hindu Law ... 1

————— *Hindu Law—effect of a compromise by a widow when followed by decree.*

See Hindu Law—Reversioners ... 43

**Revision**—*Code of Civil Procedure, 1882, section 310A.*

See Code of Civil Procedure, 1882, section 244 ... 557

————— *Sanction to prosecute.*

See Code of Criminal Procedure, 1898, section 439 ... 749

————— *Small Cause Court decision—Powers of the High Court.*

See Provincial Small Cause Court, 1887, section 25 ... 295

————— *Not entertained where other remedies open to aggrieved party.*

See Specific Relief Act, 1877, section 9 ... 297

**Right to sue**—*Auction purchase—Code of Civil Procedure (Act XIV of 1882), Section 244.*

See Code of Civil Procedure (Act XIV of 1882), section 244 ... 20

————— *Costs not allowed in execution department—Costs of objections—Suit not maintainable.*

Costs incurred by the plaintiff in preferring objections in the execution department, under section 278, Civil Procedure Code, cannot be recovered by a separate suit, even if

**Right to sue—(contd.)**

the court states no reason for ordering that the costs should not follow the event. *Mahram Das v. Ajudhia*, I. L. R., 8 All., 452, and *Kadi Bux v. Salig Ram*, I. L. R., 9 All., 474, referred to.

<i>SALIG RAM v. TIKA RAM</i> ... ..	140
——— <i>Declaration of right to kill Cows.</i>	
See Code of Civil Procedure, 1882 ... ..	147
——— <i>Suit to set aside a decree—no fraud alleged.</i>	
See Decree .. ..	35
——— <i>Payments towards decree not certified under section 258 of the Code of Civil Procedure, 1882—Suit for recovery of that amount.</i>	
See Code of Civil Procedure, 1882, section 244 ... ..	470
——— <i>Ex parte decree for money realized—reduction of the amount upon appeal—referred.</i>	
See Code of Civil Procedure, section 244 ... ..	527
——— <i>Concurrent lease—right of the second lessee to sue the first for rent.</i>	
See Lease ... ..	423
——— <i>Stamp Act (II of 1899), sections 40 and 44—duty and penalty recovered from person filing document—suit against Secretary of State.</i>	
See Stamp Act, 1899, section 40 ... ..	262
——— <i>duty—penalty recovered from persons not liable to pay duty under Stamp Act, 1899—right to recover from the same.</i>	
See Stamp Act, 1899, section 40 ... ..	262
<b>Rules of the Local Government—under section 320 of the Code of Civil Procedure—Rule 17 (XII).</b>	
See Code of Civil Procedure, section 310A .. ..	253
<b>Sanction to prosecute—Revision.</b>	
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——— <i>Order not specifying the place and occasion of offence—defective.</i>	
See Code of Criminal Procedure, section 195 ... ..	247
<b>Second appeal—Custom—question—law.</b>	
See Code of Civil Procedure, 1882, section 584 ... ..	456
<b>Shea Law—</b>	
See Muhammadan Law—Shea Law ... ..	543
<b>Specific Performance—</b>	
See Lessor and Lessee ... ..	529
<b>Specific Relief Act (II of 1877), section 9—Suit for possession—Criminal proceedings—effect of Revision—other remedy open—not entertainable.</b>	
Criminal proceedings, if any, taken under section 145 of the Criminal Procedure Code, in no way interfere with the plaintiff's right, under section 9 of the Specific Relief Act, which accrued so soon as his possession was interfered with by the defendant.	

**Specific Relief Act (II of 1877)—(contd.)**

The High Court will not interfere in revision where other remedies are open to the aggrieved party. *Sheo Prasad v. Kastura Kuar*, I. L. R., 10 All., 119, referred to.

JWALA *v.* GANGA PRASAD ... 297

**section 42—Possession—Suit for declaration of title—Application for partition in Revenue Court—Objection—Land Revenue Act (Act III of 1901), sections 111, 233 (k).**

The plaintiffs who were lambardars objected, under section 111 of the Land Revenue Act, to an application for partition made by the defendant, alleging that the latter had no share in the zamindari, and they were required to institute a suit in the Civil Court. Accordingly the present suit for declaration was brought.

*Held*, that the plaintiffs being admittedly in possession as lambardars, all that was needed was a declaration to the effect that the defendant had no title, and such a declaration having been made by the Civil Court, it would not be necessary for the plaintiffs to seek any further relief. The suit, therefore, was not barred under the provisions of section 42, Specific Relief Act.

*Held*, also, that section 233 (k), Land Revenue Act, did not apply to the case as it was provided for by section 111 of that Act, and the decision of the Civil Court referred to in the latter section meant the "final decision" of that court.

RAM CHARAN *v.* RAM PARTAB ... 614

**section 42—proviso—One plaintiff out of possession—other plaintiff in possession in defendant's right—Declaratory suit—Second suit for possession.**

Where out of two plaintiffs to a suit for declaration of title, it appeared that one was not in possession of the property claimed, and the other was in possession, but in the right of the defendant who had previously been in possession, *held*, that the suit was barred by the express provisions of section 42, Specific Relief Act, and ought to be dismissal. But the dismissal of this suit would not affect the right of these plaintiffs, if they were entitled to possession, from instituting and maintaining a suit for possession.

AKBAR KHAN *v.* TURABAN ... 640

**Stamp Act (II of 1899), sections 40 and 44—Duty and penalty—recovered from person filing documents—suit against Secretary of State—maintainability of.**

Certain documents insufficiently stamped were put in evidence by the representatives in interest of the executants. The Collector recovered from the persons filing them, the duty and penalty by sale of their property. *Held*, that the Collector's order was open to review by Revenue authorities, and no suit lay against the Secretary of State for refund of penalty realised. *Held* further, that the persons, who wish a document to be admitted in evidence, are the persons from whom a Collector can realise the duty and penalty, and if it is due from a third person, they can bring a suit and recover it from him.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BASHARATULLAH ... 262

**Stamp Act II of 1899)— contd.]****section 44.**

See section 40 ... .. 262

**section 62, sch. I, art. 53 (c)—decree**

*for rent—merging of rent in decree—payment of decree—Receipt, whether Stamp necessary.*

Article 53 (c) of the Stamp Act does not exempt, from payment of stamp, a receipt of payment of a decree for rent although it makes an exception in favour of a receipt for payment of rent of an agricultural holding. When the debt of rent merges into a decree, a receipt for money paid must be stamped.

Absence of fraudulent intention in not stamping a receipt of payment of a decree is not sufficient to make a conviction bad.

DOONGAR SINGH *v.* KING-EMPEROR ... .. 717

**Statute—Construction of—retrospective effect.**

See Agra Tenancy Act, 1901, section 22 ... .. 738

See N.-W. P., Rent Act, 1881, section 174 ... .. 472

**Stay of execution of decree—decree against widow—death of the widow—objection by the reversioners that they are not representatives of the widow—duty of the court.**

See Code of Civil Procedure, section 244 ... .. 550

**Step in aid of execution — Process fee—payment without application to issue proclamation.**

See Limitation Act, Sch. II, Art. 179 (4) ... .. 258

**Sub-mortgage.**

See mortgage—sub-mortgage ... .. 402

**Succession certificate Act, 1889—section 4.**

See section 2 ... .. 598

**sections 2, 4—Deferred dower**

*—Debt—Muhammadan Law.*

Dower, whether it be prompt or deferred, is a debt due from the husband to the wife. Deferred dower is a debt payable in the future. A court, therefore, cannot pass a decree for its recovery by the heir of the lady without the production of a succession certificate.

ABDUL KARIM KHAN *v.* MAKBUL-UN-NISSA BEGUM ... 598

**Suits Valuation Act (VII of 1887), section 8—Value of a suit for redemption—Market value—Principal amount—Appeal from an order of Subordinate Judge.**

The value of the subject matter of the suit in a redemption suit is not the market value of the property but the amount of the mortgage money. In a suit for redemption where the principal amount of mortgage was Rs. 1,000, *held*, that the suit was cognisable by a Munsif and an appeal lay to the District Judge from an order of the Subordinate Judge returning a plaint for presentation to the proper Court. Section 8 of the Suits Valuation Act does not affect the law laid down in *Kubair Singh v. Atma Ram*, I. L. R., 5 All., 332, and *Amanat Begam v. Bhajan Lal*, I. L. R., 8 All., 438.

KEDAR SINGH *v.* MATA BADAI SINGH ... .. 713

**Transfer of Property Act (IV of 1882), section 52**—*Lis pendens*  
—*sale during the pendency of suit*—*Service of summons*  
—*not effected*—*effect of*.

When after the institution of a suit for pre-emption, the vendee sells the property, the sale cannot, having regard to the provisions of section 52, Transfer of Property Act, affect the right of the plaintiff, to the decree which he might have obtained in the suit, as the purchaser takes the property subject to the result of the suit. *Manpal v. Sahib Ram*, I. L. R., 27 All., 544, distinguished. The fact that the vendee sells the property before service of summons does not make section 52 inapplicable. *Faiyaz Husain v. Prag Narain*, I. L. R., 29 All., 339, referred to.

GHASITEY v. GOBIND DAS ... .. 477

**section 53**—*Mortgage*—*Assignment of fictitious mortgage*—*Subsequent mortgage for consideration*—*No interest passes to the transferee*—*Rights of assignee as against mortgagor and subsequent mortgagee*—*Estoppel*.

One *M* made a fictitious mortgage of certain property in favour of *H* who transferred the mortgagee rights to his wife in lieu of dower debt. The wife obtained the transfer in good faith and for valuable consideration, but without making any enquiry as to her husband's rights. *M* made a mortgage of the same property to the respondent who sued to enforce it. *Held*, that the transfer of the fictitious mortgage did not pass any interest to the transferee notwithstanding that it was made *bona fide* and for valuable consideration. The *proviso* to section 53 was intended to safe-guard the rights which had already been acquired. A purchaser for value must be the purchaser of something.

*Held*, further, that as *M* had made a fictitious mortgage in favour of *H* who thereby defrauded his wife, she could enforce that mortgage against *M* and he could not be heard to say that the mortgage was fictitious and colourable. The balance of sale proceeds, if any, after satisfying the plaintiff's mortgage and all prior charges should be applied to payment of the amount of the consideration named in the transfer made in her favour with interest. *Bickerton v. Walker*, 31 Ch. D., 151, applied. *Halifax Joint Stock Banking Co. v. Gledhill*, [1891] 1 Ch. D., 31, distinguished. *Cookell v. Taylor*, 15 Reav., 103; *Ogilvie v. Jeafferson*, 2 Giff., 353; *Strode v. Blackburn*, 3 Ves., 222; *Wallwyn v. Lee*, 9 Ves., 24; *Parker v. Clarke*, 30 Beav., 54; *French v. Hope*, L.J., 56 Ch. 363; *Rice v. Rice*, [1853] 2 Drew, 73, referred to.

BASTI BEGUM v. BANARSIDAS ... .. 305

**section 55.**

See Limitation Act, 1877, sched. II, art. 132 ... .. 243

**section 58**—*Deed of indemnity*—*Property mortgaged*—*Hypothecation*.

Certain persons sold certain property to the plaintiffs. The vendors executed a document of indemnity on the same date agreeing that if any prior lien or charge should be disclosed, they would repay the whole money with interest and they hypothecated certain property to secure repayment of the purchase money. The vendees were dispossessed. In a suit to enforce the hypothecation in the document of indemnity, *held*, that there was clearly an engagement which gave rise to a pecuniary liability and that the terms amounted to a

**Transfer of Property Act (IV of 1882)—(contd.)**

mortgage within the meaning of section 58 of the Transfer of Property Act. *Kishan Lal v. Ganga Ram*, 1. L. R., 13 All., 28, referred to.

NIAZ AHMED *v.* MANGU LAL ... .. 723

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**section 68 (c)—Right of usufructuary mortgage to recover mortgage money by sale of mortgaged property.**

Where usufructuary mortgage deed provided for the recovery of the amount due "from the mortgaged property" the court granted a decree for sale of the property where the mortgagee, being dispossessed of the mortgaged property sued for recovery of the mortgage money. *Jafar Husen v. Ranjit Singh*, 1. L. R., 21 All., 4; *Kashi Ram v. Sardar Singh*, A. W. N., [1905] p. 226, referred to.

NARAPT *v.* RAM SARAN DAS ... .. 130

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**section 85—Parties adverse claimants, whether may be joined—Suit for sale.**

Adverse claimants ought not be made parties to a mortgage suit for the purpose of litigating their titles, and that the only proper parties to such a suit are persons interested in the equity of redemption. *Jaggewar Dutt v. Bhubban Mohan Mitra*, 1. L. R., 35 Cal., 425, followed.

KHAIRAT *v.* BANNI BEGUM ... .. 604

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**section 90—Right to decree—Part of contract—Limitation Act (XV of 1877), art. 116.**

A personal covenant to pay although not expressed, is implied in and is an essential part of every simple mortgage. The right of the plaintiff to a decree under section 90 of the Transfer of Property Act is a part of and arises out of the contract in writing and registered and is governed by article 116 of the Limitation Act. *Sawaba v. Abaji*, 1. L. R., 11 Bom., 475, not followed. *Unichaman v. Ahmed Kutti*, 1. L. R., 21 Mad., 242; *Hamiduddin v. Kedar Nath*, 1. L. R., 20 All., 385, referred to.

JANGI SINGH *v.* CHANDAR MAL ... .. 670

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**section 91—Mortgage by fixed rate tenant—Redemption by zamindar—Interest in the land—Fixed rate tenant dying childless—Lapse to the Crown.**

The person claiming redemption of property must prove that he has an interest in it. Where a fixed rate tenant dies childless, the tenancy vests in the Crown. *Rani Sonet Kumwar v. Himmat Bahadur*, L. R., 3 I. A., 92. The mere fact that the zamindar has a proprietary interest in the land, out of which the interest of a fixed rate tenant is carved, does not give him an interest in the mortgaged property within the meaning of section 91 of the Transfer of Property Act.

RAM DIHAL RAI *v.* MAHARAJA VIZIANAGRAM ... .. 579

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**section 91 (a), 92—Reversioner's right to redeem in the life-time of widow—Interest, meaning of.**

A reversionary heir cannot get a decree for redemption of property mortgaged by the deceased husband of a Hindu widow during the life-time of the widow in possession of the estate. The provisions of section 92, Transfer of Property

**Transfer of Property Act (IV of 1882)—(concl'd.)**

Act, do not apply to a person who is a reversionary heir and may never become entitled to the property sought to be redeemed.

The *interest* referred to in section 91 (a) of the Transfer of Property Act is a *present* interest and not a mere *contingent* right such as a reversioner possesses.

RAM CHANDER *v.* KALLU ... 631

**section 99—Sale held in contravention of—Notice to judgment-debtor—Application to set aside—after confirmation.**

A property, subject to a mortgage, cannot be sold in execution of a simple money decree held by the mortgagee, even where he disclaims all his interests under the mortgage, and obtains a simple money decree. *Madho Prasad v. Baijnath*, A. W. N., for 1905, p. 152, referred to. But where a property has been sold after notice to the mortgagor, in execution of a simple money decree held by the mortgagee and the sale is confirmed, the mortgagor cannot go behind the order for sale and seek to have it set aside on the ground that it was held in contravention of section 99 of the Transfer of Property Act. *Madan Makund Lal v. Jamna Kaulapuri*, 2 A. L. J. R., 123, followed. After the sale is confirmed, as between the auction purchasers and the judgment-debtors, the title of the former becomes complete and it is not open to the judgment-debtor or his representatives to question the title of the auction purchaser.

KISHAN LAL *v.* UMRAO SINGH ... 121

**Trust—charitable purposes—deed construction—not void for vagueness—**

Where a deed of endowment recited that the executant had established a *dharamshala* for charitable purposes and he had carried on the charity : *held* that the trust was not void for vagueness. A trust for such purposes, that is, charity generally, will always be carried out notwithstanding that the objects of the charity are not specifically defined. *Ranchhordas v. Parvati Bai*, I. L. R., 23 Bom., 725, distinguished.

GURDHAN DAS *v.* CHUNNI LAL ... 23

**effect of not carrying it out.**

Where the court finds a properly constituted trust, the fact that the trust was not carried out would not have the effect of annulling it.

GORDHANI DAS *v.* CHUNNI LAL ... 23

**suit for possession of trust properties—Parties.**

Where the plaintiffs in a suit ask for possession in the character of trustees of certain endowed property and omit to implead persons interested in a particular item of that property, they cannot in that suit obtain a decree declaring that property subject to the charge of maintaining the trust.

GORDHAN DAS *v.* CHUNNI LAL ... 23

**appointment of a new trustee.**

See Religious Endowment Act, 1863 ... 191

**Grant of superior rights to the Hindu widow of an inferior proprietor—Nature of the estate taken in such grant by the Hindu widow.**

See Hindu Law—alienation—widow ... 490



- Usufructuary mortgage**—*right of such mortgagee to recover debt by sale of the mortgaged property.*  
 See Transfer of Property Act, 1882. Section 68 (c) ... 130
- Valuation of suit**—*Code of Civil Procedure (Act XIV of 1882), Section 283.*  
 See Court Fees Act, (VII of 1870).. ... 10
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- Redemption mortgage.*  
 See Suits Valuation Act, 1887, section 8 ... 713
- Vendor and purchaser**—*Non-payment of consideration—Rights of Purchaser—Equities.*  
 Mere non-payment of purchase money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser, notwithstanding such non-payment can maintain a suit for possession. *Shib Lal v. Bhagwan Das*, I. L. R., 11 All., 244 ; *Umed Mal v. Davu*, I L. R., 23 Bom., 525, referred to.  
 A court is entitled to pass a decree in favour of the plaintiff for possession, subject to the equities which exist in favour of the defendant.  
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- Unpaid Vendor's lien-charge.*  
 See Limitation Act (XV of 1877), Schedule II, article 132... 243
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- Covenant for title—construction of sale-deed.*  
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- Voluntary payment**—*Husband's debt satisfied by his wife during his life-time—Transfer of husband's property after his death—Liability to pay consideration money.*  
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- Wavier**—*Instalment bond—Whole amount payable upon failure to pay any instalment.*  
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- Wajib-ul-arz**—*Construction of.*  
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- Widow**—*Alienation—Hindu Law—Widow's estate as an inferior proprietress—Grant of superior proprietary rights—Nature of estate taken in such grant—Grant—Trust.*  
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- Alienation—consent of reversioners legal necessity.*  
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- Compromise by—effect of a decree thereon on the rights of Hindu Reversioners.*  
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- Widow's estate**—*Grant of superior rights to the Hindu Widow if an inferior proprietor—Nature of estate in such grant.*  
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- Will**—*Construction of.*  
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**WIII—(concl'd.)****———construction of—Persona designata—Reason and motive of gift—‘Adopted son’—Description.**

Where a Hindu testator bequeathed his property to “Lalta Prasad my adopted son,” *held*, in the absence of anything in the will to show that the fact of the adoption of the devisee was the motive or the reason for the gift, that the language of the gift was to be interpreted in its ordinary meaning as a gift to Lalta Prasad as a *persona designata*, who was entitled to take under it even though the adoption was not proved. *Nidhoo-moni v. Saroda Pershad*, L. R., 3 I. A., 253, followed.

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**———construction of—Rupia—“Money”—Presumption against partial intestacy.**

In the absence of explanatory context a word such as “money” should be construed in its strict sense, but terms which in their strict and proper signification apply to a particular species of property, may be held to embrace the general personal estate of a testator where the latter has shown a clear intention to make a complete disposition of his property.

The Court always leans against so construing a will as to make a testator die partially intestate. Where therefore it appeared that a testator did not intend to die intestate as to any portion of his property and made certain dispositions with regard to “my money (*rupia*) and the money due to me under bonds which may be realised,” *held*, that he intended the word ‘money’ (*rupia*) should be synonymous with the words *turka* (heritage) and *jaidad* (estate) which he had used in the earlier part of the will. *Cadogan v. Palagi*, L. R., 25 Ch. D., 154, referred to.

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**———construction of—Intention—Inappropriate words—“Cash”—Mortgage bonds.**

In construing a will what the court is concerned with is to ascertain the intention of the testator, and if it finds that he intended that all his moveable property should pass to the legatee, it should not hesitate to carry out the testator’s intention even though he used an inappropriate word such as “cash.”

No absolute technical meaning should be given to such a word as “money.”

*Cadogan v. Palagi*, L. R., 25 Ch. D., 154, and *Chheda Lal v. Gobind Ram*, ante, 519, referred to.

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**———unpaid legacy—lapse of time—presumption.**

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**———unpaid legacy—lapse of time—presumption—minority of the legatees.**

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